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# REPORTS

OF

## Cases in Law and Equity

DETERMINED IN THE

# S U P R E M E C O U R T

OF THE

## STATE OF NEW YORK.

BY OLIVER L. BARBOUR, LL. D.



VOL. XLVIII.



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*Rec Feb 22. 1868*

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# JUSTICES OF THE SUPREME COURT,

## DURING THE YEAR 1867.

---

### FIRST JUDICIAL DISTRICT.

- CLASS 1. WILLIAM H. LEONARD.\*  
" 2. GEORGE G. BARNARD.  
" 3. THOMAS W. CLERKE.  
" 4. JOSIAH SUTHERLAND.  
" 5. DANIEL P. INGRAHAM.

### SECOND JUDICIAL DISTRICT.

- " 1. WILLIAM W. SCRUGHAM.††  
" 2. JOHN A. LOTT.\*  
" 3. JOSEPH F. BARNARD.  
" 4. JASPER W. GILBERT.

### THIRD JUDICIAL DISTRICT.

- " 1. RUFUS W. PECKHAM.\*  
" 2. THEODORE MILLER.  
" 3. CHARLES R. INGALLS.  
" 4. HENRY HOGEBOOM.

### FOURTH JUDICIAL DISTRICT.

- " 1. AUGUSTUS BOCKES.†  
" 2. AMAZIAH B. JAMES.\*  
" 3. ENOCH H. ROSEKRANS.  
" 4. PLATT POTTER.

## JUSTICES OF THE SUPREME COURT.

## FIFTH JUDICIAL DISTRICT.

- CLASS 1. LE ROY MORGAN.\*  
" 2. WILLIAM J. BACON.  
" 3. HENRY A. FOSTER.  
" 4. JOSEPH MULLIN.

## SIXTH JUDICIAL DISTRICT.

- " 1. JOHN M. PARKER.†  
" 2. CHARLES MASON.\*  
" 3. RANSOM BALCOM.  
" 4. DOUGLASS BOARDMAN.

## SEVENTH JUDICIAL DISTRICT.

- " 1. JAMES C. SMITH.\*  
" 2. HENRY WELLES.  
" 3. ERASMUS DARWIN SMITH.  
" 4. THOMAS A. JOHNSON.

## EIGHTH JUDICIAL DISTRICT.

- " 1. MARTIN GROVER.†  
" 2. CHARLES DANIELS.\*  
" 3. RICHARD P. MARVIN.  
" 4. NOAH DAVIS.

JOHN H. MARTINDALE, *Attorney General*.

\* Presiding Justice.

† Sitting in the Court of Appeals.

‡ Died July 9, 1867.



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CASES  
IN  
Law and Equity  
IN THE  
SUPREME COURT  
OF THE  
STATE OF NEW YORK.

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In the matter of widening Bushwick Avenue in the city  
of Brooklyn.

48b	9
157a	173
48b	9
58a	598

In laying out a street, lands may be taken to be used for the purposes of court yards only by the owners of lots of which they form a part; and other premises may be assessed for the expense.

The report of the commissioners, awarding damages for land taken, will not be sent back for correction because of the inadequacy of the awards, unless it appears that there was an error in the principle upon which the commissioners proceeded in making the awards.

**A** PPEAL from an order made at a special term, confirming the report of commissioners of estimate in proceedings for widening Bushwick Avenue, in the city of Brooklyn. The following opinion was delivered at the special term.

SCRUGHAM, J. It is objected, that awards have been made for the land which by the act is to be set apart and used for court yards. The right of the owner to use this land for any

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In the matter of Bushwick Avenue.

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other purpose is taken from him, and some compensation should be made to him for this deprivation. The commissioners, in making their awards, in such cases, should have considered the interest in this land which was left in the owner, and should have awarded to him a smaller amount than would have been their award had the act contained no such provision in regard to these lands. I find no evidence that they have acted on a different principle : on the contrary, comparison between the awards made by them for the land taken north of Wall street and those made for the lands taken south of Wall street, clearly shows that their awards were made upon the correct principle, in this respect.

It is also objected, that the owners of lands to be assessed for this improvement ought not to be required to pay for the land which is to be set apart for court yards, as that property is not taken for public use, but for private use. This, however, is not so, as the land is taken for a public purpose, to widen the street.

The object and public benefit of widening a street is not only to render it more convenient for travel, but to beautify it, and by thereby making the unoccupied property fronting on it more desirable for residences, to induce its settlement and the erection of valuable buildings upon it ; and the security of the public health in the locality through which the street passes, may also, I think, be considered an advantage of its widening.

It is also evident that the width of Bushwick Avenue, between Wall street and the city line, was established at one hundred and twenty feet to secure these advantages, rather than to promote the convenience of travel over it, not only from the provision in reference to court yards, but also from the fact that its width is fixed at but eighty feet in that part of its route where the travel over it is, and is likely to continue to be, most extensive ; and they are as effectually attained by allowing twenty-feet to be used for court yards and preventing the erection of buildings thereon, as they would

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In the matter of Bushwick Avenue.

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be if the whole width was open for public travel. The effect of the act in reference to these strips of land of twenty feet in width on each side of the avenue, is to take from the owners the right to erect buildings upon them, or to use them for any other purpose than for court yards; and as, in their estimate, the commissioners have considered and deducted the value of the rights left in the owners, the persons assessed for the improvement will only be required to pay for what is actually taken.

An order may be entered, confirming the report.

An appeal was taken from the order entered upon the above decision, to the general term, which was argued by

*George Thompson* and *Charles N. Black*, for the appellants, and

*Sidney V. Lowell*, (asst. corp. counsel,) for the corporation.

The following opinion was delivered at the general term.

*By the Court*, J. F. BARNARD, J. Unless the commissioners proceeded upon an erroneous principle, it is not possible to review their determination upon questions of value and damages. This is a necessary rule and well settled. (*Matter of Central Park*, 16 Abb. 56. *Matter of Freeman Street*, 17 Wend. 649. *Troy and Boston R. R. v. Lee*, 13 Barb. 169.)

A report of commissioners like these is never sent back, whatever may be the number of witnesses who differ in their estimates from the commissioners in their opinions as to the damages. (*Matter of William and Anthony Streets*, 19 Wend. 678.) I do not find in the report any evidence of an erroneous principle of assessment. It is claimed by the counsel for Staats, that no damages were given for two of his cellars, which will be thrown under the street as widened, but so far

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In the matter of South Seventh street.

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under that the grading of the street will not destroy them. This would, I think, be erroneous, if it so appeared by the report. It does not so appear. The damage is reported as given for buildings and cellars. I cannot assume that this money to compensate Staats for any thing less than for all his (Staats) cellars, which will be by this opening thrown into the street. The taking of twenty feet on each side of the avenue, and the appropriation of the same as court yards *only*, is such a taking as will justify an appraisalment of damages therefor. A dominion is asserted over this land by the public, to the extent of depriving the owner of his right to use and enjoy the same for any other purpose than a court yard.

It is so far taken for public use, and is a subject for compensation. The report shows that the commissioners estimated such lands at much less than lands actually thrown into the street.

I do not find any errors or omissions in the proceedings preliminary and subsequent to the report.

The order should be affirmed.

[ORANGE GENERAL TERM, September 11, 1865. *Brown, Lott and J. F. Bernard*, Justices.]

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48b 12  
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48b 12  
72 AD '398

In the matter of widening South Seventh street, in the city of Brooklyn.

Land may be taken for a street, adjoining its continuous line, to prevent angular pieces of property being left, when authorized by the legislature.

It is no objection to the report of commissioners of estimate, that one of the commissioners holds the legal estate in a portion of the premises taken for the street.

It is not necessary for the common council of the city of Brooklyn to specifically direct the corporation counsel to move for the confirmation of the commissioners' report. It is his duty to take all necessary proceedings, by virtue

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In the matter of South Seventh street.

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of his office, when the common council have given him notice to carry out the improvements.

The report of the commissioners, awarding damages for land taken, will not be sent back for correction because of inadequacy of awards, unless it appears that there was an error in the principle upon which they proceeded, in making their awards.

It is proper for the legislature to provide that in proceedings for opening and widening a street, the expenses incurred under a former act of the legislature for the same purpose be included as a part of the expense.

**A** PPEAL from an order made at a special term, confirming the report of commissioners of estimate in the above matter. The following opinion was delivered at the special term.

**SCRUGHAM, J.** It is provided by the act of April 26, 1861, amending the act to widen and improve Bushwick Avenue, and other streets, in the city of Brooklyn, passed April 14, 1860, that "where blocks shall be formed by reason of the widening or extending of any of the streets or avenues authorized to be improved by that act, (among which are the streets in question,) having an angle of less than forty degrees, the board of commissioners appointed by that act shall fix the lines of said streets and avenues in such a manner that such angular points be cut off from said block, and shall be included in said streets and avenues as parts of the same, to such an extent as will leave a front of ten feet between the streets and avenues widened and extended and the adjoining street forming said angle." Under this act maps were made and filed showing the lines of South 7th street and a part of South 6th street, as determined and fixed by the commissioners. In widening South 6th street, as directed by said act, all of the land of B. C. Mount was taken, except a small triangular piece forming the end of a block having an angle of less than forty degrees, and in cutting off the angle to such an extent as to leave a front of ten feet between South 6th street and Division avenue, the whole of this triangular piece of land was taken.

The act of May 2, 1863, under which the present proceed-

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In the matter of South Seventh street.

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ings are taken, widened the streets as described in the former act, and as laid down on the maps filed pursuant to that act. There is no force, therefore, in the objection of Mr. Mount, that the commissioners have included lands belonging to him not described in the original proceedings, and have taken his entire lot without his consent.

The streets are widened by the act, and the proceedings, which the common council take are for the ascertainment and payment of the expenses thereof ; and therefore the objection that the corporation of the city of Brooklyn had no jurisdiction to make the proposed widening, is not applicable to the case.

The commissioners are not authorized to make awards or assessments for benefit. That duty is imposed upon the board of assessors of the city, who, after the confirmation of the report of the commissioners, are to fix the district of assessment and make the proper appointments and assessments, (secs. 3 and 4.)

Sec. 2, of the act of May 2, 1863, authorizes the commissioners to include in their estimate of the expense one half of the expense theretofore incurred under the act of April 16, 1861, and their report shows that the amounts stated for counsel fees, \$900 for old commissioners, and \$50 for clerk hire, are items of the half of those expenses. The charge which is objected to as a charge for searches, is, in reality, and, as mentioned in the report, a charge of the attorney's disbursements for registers' fees for searches. And I see no impropriety in it, nor in the charge for compensation for more than one surveyor.

The objection that the parties in interest have had no opportunity to be heard before the commissioners since the filing of the report of November 14, 1864, of which confirmation is now sought, is not tenable. Such report was made in revision and correction of a report of which confirmation had been sought, and which had been referred back to the commissioners for that purpose—no other notice is required

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In the matter of South Seventh street.

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in such cases than of the filing of the report and of the application for its confirmation. (*Charter, Title 4, § 13.*)

There is no evidence that the awards are made upon the basis that the owners are expected to remove their buildings and improvements, or that compensation is only made for the damages they would sustain by such removal. On the contrary, the report expressly states that the awards are made for buildings taken.

It is objected that one of the commissioners, Mr. Runcie, is interested in the improvement. I understand it to be admitted that a lot taken by the improvement, and for which an award of \$237.60 is made, belongs to the legatees of Abraham A. Runsen deceased, of whose estate Mr. Runcie is the trustee. It does not appear that he has any beneficial interest in the awards. If the authority for the appointment of the commissioners was derived from the charter of the city of Brooklyn, which provides that the persons appointed shall not be interested in improvements, it might be necessary to consider whether this trusteeship established such an interest as should disqualify him; but as authority for the appointment is not so derived, but is conferred by the act of May 2, 1863, which contains no such restriction, and as it is evident that he had no such interest in the matter as would be likely to affect his impartiality, or in any manner influence his judgment, this objection will not warrant a refusal to confirm the report.

The act under which these proceedings are taken provides, that from and after the appointment of the commissioners to ascertain the expense of the improvement, &c. the law in force in relation to the opening of streets in the city of Brooklyn shall apply to these proceedings. Those laws require that after the report of the commissioners of estimate in street opening has been reviewed, corrected and refiled by them, the common council shall cause a notice of an application for the confirmation of such report to be published. They have no discretion in the matter. The performance of the act is en-

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In the matter of South Seventh street.

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joined upon them, and may be compelled by any interested party. The necessity for it is created by their resolution authorizing the improvement, the publication of this notice being a necessary step in the proceedings, which they thereby inaugurate. I do not therefore see why any resolution is necessary, especially, to cause the publication of this notice. The attorney and counsel for the corporation is their officer, and by their charter he has the charge, management and control of, and is directed to conduct, all the proceedings necessary in opening streets. Causing the publication of the notice is one of these proceedings, and his act in that respect is the act of the common council, who authorize him to perform it in their behalf by giving notice of their resolution permitting the improvement, and directing him to apply for the appointment of commissioners.

There is certainly a remarkable difference between the estimate made by the commissioners of the damages to some of the objectors and the statements made in the affidavits read in opposition to the motion; but these statements are generally of opinions as to the value of the property taken, and no such facts are stated as would plainly show that the commissioners have fallen into an error in their estimates. Without such plain proof, this court will not send back a report of commissioners for correction, unless it appears there was an error in the principle upon which they proceeded in making their award. I find no such error.

An order may be entered, confirming the report.

An appeal was taken, from this decision, to the general term, which was argued by

*Geo. Thompson, N. F. Waring, D. P. Barnard and S. M. Meeker*, for the appellants, and

*Sidney V. Lowell*, (asst. corp. counsel,) for the corporation.

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Ferris v. The People.

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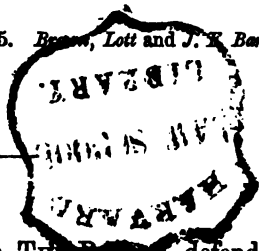
The following opinion was delivered at the general term.

*By the Court, J. F. BARNARD, J.* There is no ground for the objection, that the owners of buildings taken are only allowed damages for the removal of the buildings. The report expressly assesses the damages for "buildings taken."

There is also an objection, that one of the commissioners was a trustee for infant children who owned a small piece of the land taken, and for which damages were assessed. I think this objection not good. The commissioner had no interest in the question of damages; he could as well act in the assessment of these damages, as town and city assessors who assess their own relatives' property. Any other rule would be impossible in the internal management of cities and towns, where many of the questions are such as affect the private interest of a large number of the people.

The assessment should be confirmed.

[ORANGE GENERAL TERM, September 11, 1865. *Barnard, Lott and J. F. Barnard, Justices.*]



FRANCIS FERRIS, plaintiff in error, *vs.* THE PEOPLE, defendants in error.

The mere fact that the sheriff has expressed his opinion that the prisoner is guilty, in a criminal case, is not a ground of challenge to the array. It is necessary for some other fact to be alleged, in the challenge, to render the charge material; as that the sheriff has intentionally omitted to summon some juror, or has stated his opinion to some juror.

Mere irregularities in drawing and summoning the jurors, not shown to have prejudiced the prisoner, are not a ground of challenge to the array, where there is no charge of fraud or corruption in any of the officers who drew or summoned the jurors, or certified the list.

Nor is it a ground of challenge to the array, that the court excused and excluded 764 of a panel of 1000 jurors drawn, from attendance, without reasonable cause shown; the act being within the proper discretion of the court.

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No venire is necessary, in criminal cases. The writ has been expressly abolished in civil cases; and jurors in criminal cases are required to be summoned in the same manner as in civil cases.

A plea of a former indictment for the same offense, arraignment thereon, plea of not guilty, and the commencing of the trial, when the same was abandoned, without going to the jury, is no bar to a second indictment.

Where no objection is made in the court of general sessions of New York, that the trial was had after the close of the third week of the term, it cannot be urged as a ground of objection on writ of error, that no order for the continuance of the term appears on the record of judgment. The omission to incorporate that fact in the record does not show that the order was not duly entered on the minutes of the court. It is not necessary it should be included in the record; and every intendment is in favor of the regularity of the proceedings.

**W**RIT of error to the New York court of general sessions, in which the plaintiff in error was convicted, in February, 1865, of murder, in the first degree. Various exceptions were taken on the trial, which are sufficiently stated in the opinion of the court.

*John H. Anthon* and *W. F. Kintzing*, for the plaintiff in error.

*A. Oakey Hall*, (dist. attorney,) for the people

**LEONARD, J.** Ferris was indicted, tried and convicted of murder in the first degree at the court of general sessions in the city of New York. The case was tried on the 27th and 28th of February, 1865, after the close of the third week of the February term. As it appears from the return of the clerk, an extra panel of 1000 jurors was drawn on the 7th day of February, 1865, in the presence of certain officers, required by law to attend, who were duly notified for that purpose, and, as it also appears from the return of the sheriff, these jurors were all duly summoned. No question is made that these were not the proper officers to attend and certify the drawing of jurors. The counsel for the prisoner challenged the array of jurors, specifying in writing nine separate

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grounds of objection. In the challenge is incorporated the returns and certificates of these different officers, and it is also therein stated that the panel or list of jurors was filed on the 13th of February, being the same panel then in court, wherefrom the jury to try the said indictment were to be selected. The first ground of challenge alleges that the sheriff who summoned the jurors had formed and expressed an opinion as to the guilt or innocence of the prisoner. The next seven grounds allege a want of compliance with the statutes in respect to the drawing of the jurors, viz: The proper officers did not actually attend; some of them signed blank certificates, which the clerk filled up after the drawing; no minutes of the drawing were kept; no copy of the minutes was delivered to the sheriff; the sheriff summoned the jury without any copy of the minutes being furnished to him; the ballots drawn from the jury box were delivered to him, from which he summoned the jurors; and the panel or list filed is not a copy of the minutes of the drawing. The other ground of challenge is that the recorder, who held the court at which the prisoner was tried, excused 764 of the jurors from attendance, without reasonable cause shown. There was no charge of any fraud or corruption against any of the officers who drew or summoned the jurors, or certified the list, nor of any injury or prejudice to the prisoner. The district attorney demurred to the challenge; admitted the facts as alleged, and insisted that none of the objections were well taken. The recorder sustained the demurrer. The defendant then interposed a special plea, that before the finding of the indictment upon which he was then arraigned, another indictment for the same offense had been found against him, which was still in full vigor, to which he had pleaded not guilty, and the issue so joined had been brought on for trial in the same court; that the prisoner had then challenged the array of jurors, which had been overruled; that one juror had been drawn whom the prisoner had challenged; that he afterwards withdrew his challenge, and consented that the

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juror might be sworn in chief; that in opposition to the wishes of the prisoner the people refused to further prosecute that indictment, and the trial was then postponed notwithstanding his objection. A demurrer to this plea was put in by the people, and the prisoner joined issue thereon. The court sustained the demurrer, and gave judgment for the people. By leave of the court the prisoner then pleaded not guilty, to the charge contained in the indictment. A jury was then impannelled from the array aforesaid, and the trial proceeded, which resulted in the conviction of the prisoner.

I. The challenge to the array on account of the expression of an opinion by the sheriff who summoned the jury, in respect to the guilt or innocence of the prisoner, is novel in its character, and no direct precedent or decided case has been cited in support of the objection. The statute limiting challenges to the array so as to exclude any objection based upon the interest in the cause, or relation of the sheriff to either party therein, has been urged on behalf of the people, as an answer to the challenge. This answer is not sufficient. The formation or expression of an opinion by the sheriff as to the guilt or innocence of the prisoner, cannot be considered an interest in the cause, in a criminal case. (2 *R. S.* 420, *marg.*) The interest referred to in the statute is of a pecuniary nature. The formation or expression of an opinion by the sheriff has no relation, by itself, to the duty which the jurors have to perform in respect to the trial. I am unable to perceive how the opinion of the sheriff injures the prisoner, unless it be alleged that he does some act or omits some duty by reason of it. A juror who has formed or expressed an opinion in relation to the case he is called on to try, would be clearly disqualified, without reference to the fact that it was favorable or unfavorable to the prisoner. Such a juror would not be indifferent. It is quite different in respect to the sheriff. In my opinion, it was necessary for some other fact to be alleged in the challenge to render the charge material; as that the sheriff had intentionally omitted to summon some

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juror, or had stated his opinion to some juror. The mere fact that the sheriff has formed or expressed an opinion seems to be wholly immaterial.

The same considerations as to materiality also apply to all the other objections. The jurors were fairly drawn from the box, so far as we know ; indeed, we must assume that it is so, since no allegation to the contrary is contained in the written challenge. The same persons were drawn and summoned that would have been had the proper officers attended and witnessed the drawing as required by law. Although it was highly improper, perhaps even a misdemeanor, in the case of those public officers who signed certificates in blank, yet it is not claimed that the smallest abuse of the confidence reposed by them in the clerk took place, or that any change was produced in the result which would otherwise have been attained. With the exception of the charge of signing a certificate in blank, to be afterwards filled up when the drawing should be completed, none of the objections to the manner of drawing the list of jurors can be considered any thing more than trifling irregularities. These questions, including that of signing the certificate in blank, are not such as can be raised by the prisoner. They are between the people and the officers. The statute directs how the duties of the officers who draw and summon jurors shall be performed ; and although it provides that it shall not be done in any other way, it is not of any materiality to the prisoner, unless some change results in the names that would otherwise have been drawn or summoned as jurors. So also in respect to the ground of challenge arising from the discharge of the larger part of the jurors. More than the usual number still remained in court. The jurors are presumed to be equally well qualified. The prisoner does not allege that he was deprived of an opportunity to select twelve men who were wholly indifferent between himself and the people, good and lawful men. The act was within the proper discretion of the recorder. None of these grounds of challenge were sufficient.

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II. It was also said by the learned counsel for the prisoner that no venire had issued. This was not made a ground of challenge to the array, but it is urged because it is not stated in the record of conviction that such a precept was issued and returned. The want of a venire, it is true, has been formerly held fatal to a conviction, on a motion in arrest of judgment. (*The People v. McKay*, 18 John. 212. *Cooper v. Bissell*, 16 id. 146.) The same doctrine was sustained in the case of *McGuire v. The People*, (2 Parker, Cr. R. 148,) on writ of error by a special assignment of error and the allegation of diminution. The venire was also necessary at common law. (*Chitty's Com. Law*, 505.) The venire has, however, been expressly abolished in civil cases. And the manner of summoning jurors in criminal cases is the same as that prescribed by law in civil cases. (2 R. S. 411, 414 and 734, § 2, *marginal pages*.) The statute as to drawing and empaneling juries is directory to the clerk, and a neglect to conform to its provisions will not, *per se*, be a sufficient ground for setting aside the verdict, when the court see that the prisoner has not been prejudiced. (*Wakeman v. Sprague*, 7 Cowen, 720. *The People v. Ransom*, 7 Wend. 427.) In the case of *The People v. Ransom*, Sutherland, J. says, after referring to the cases of *Cooper v. Bissell*, and *The People v. McKay*, (*supra*), "The error complained of appears on the face of the record; and when that is the case, it is always fatal." If no injustice has been done, the court will not interfere even on motion. (12 East's R. 229, 231, *see note*. *The King v. Hunt*, 4 B. & Ald. 430.) Best, J. says, in the latter case, "The true rule is this: if the officer has not done his duty, he is to be punished for it; and if his omission has actually produced prejudice to the party, then it is in the discretion of the court to prevent injustice being done, by granting a new trial. The omission is not shown to have been prejudicial to the defendant," and a new trial was refused.

The provision of the Revised Statutes, requiring the district attorney to issue a precept, (2 R. S. 206, § 37, 38,) is

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directory, and the omission of it has no relation to the rights of the prisoner. Although this precept is to be directed to the sheriff, and is required to command the sheriff, among other things, to summon the grand and petit jurors who have been drawn, (section 38,) it is not strictly a venire, nor is it the authority by which the sheriff summons the jurors. The authority of the sheriff for this purpose, and the proceedings to be taken, are provided by the Revised Statutes, 414. The jurors are to be drawn by the clerk, a certified list of the names is to be delivered to the sheriff, and he is required to summon those named in the list, and make his return thereon to the court. This appears to supersede, and in effect abolishes, the venire. This subject is well examined in the cases of *John Cummings*, 3 *Park. Cr.* 343, and *Francois McCann*, *Id.* 293, and although the latter case was afterwards reversed in the Court of Appeals, it was upon an entirely different question, (16 *N. Y. Rep.* 58.) The objection before us relates also only to the form of the record of judgment, and is not raised by any exception, motion or objection, prior to the bringing of this writ of error. We are required to assume that there was no precept or venire, because none appears on the record. Were this objection to prevail it would be in disregard of the provisions of the Revised Statutes, declaring that no trial, judgment, or other proceedings, on an indictment, shall be affected by reason of any defect or imperfection in matters of form which shall not tend to the prejudice of the defendant. (2 *B. S.* 728, § 52.) The jurors in this case were an extra panel, who are drawn and summoned in the city and county of New York, under a statute specially applicable to that city, and are in the place of talesmen authorized in other counties of the state. (*Davies' Laws*, p. 942, § 4.) All jurors in courts of record for the different courts in the said city, civil and criminal, are drawn and summoned in the manner provided in that act, including regular as well as extra panels. In view of these considerations, the case here is very different from that of *McGuire*, (2 *Park. Cr. R.* 148,) referred to above,

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and we are not now called upon to dissent from the authority of that case.

The objection in respect to the venire is not well taken.

III. The answer to the objection raised by the special plea of the prisoner, that there is a former indictment against him for the same offense, upon which he was arraigned, and pleaded not guilty, and a commencement was made towards a trial by calling the name of one juror, which trial was then suspended against the consent of the prisoner, is that he was never put in jeopardy under the former indictment. It was still in the discretion of the court to postpone the trial, as if it had not been commenced at all. There was no trial, conviction or acquittal—nothing that can be pleaded as a bar. Counsel for the prisoner has cited no authority to maintain his special plea, and I think none can be found.

IV. The rule laid down by the recorder, in his charge, upon the subject of insanity, is precisely that to be found in the authorities. (*Freeman v. People*, 4 Denio, 9. 2 Greenl. Ev. § 373. *Vide Opinion of C. J. Shaw, in the case of Abner Rogers, to be found in the note, § 373.*)

V. The act of 1862 (*S. L. p. 19*) affords an answer to the objection that the trial was had after the close of the third week of the term. No objection was raised at the trial on this ground; and it has been raised here solely on the ground that no order for the continuance of the term appears on the record of judgment. The omission to incorporate it in the record does not show that the order was not duly entered on the minutes of the court. Every intendment is in favor of the regularity of the proceedings. It is not necessary to be included in the record.

The judgment should be affirmed.

INGRAHAM, P. J. I think there can be no doubt but that most of the irregularities relied upon by the prisoner as grounds for challenging the array can only be considered as matters for

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which the officer neglecting the performance may be punished, but not as being available to the prisoner, unless he can show some prejudice to himself arising therefrom, and I concur, in regard to them, in the views expressed by Judge Leonard in reference thereto. That the conduct of the officer who drew the petit jury was wrong, and deserving of censure at least, if not of punishment, must be conceded ; but where the irregularities produce no harm to the prisoner and do not appear on the record, they afford no ground for a new trial. The greatest difficulty arises from the provisions of the statute, which says that when the officers appear, and not otherwise, the clerk shall proceed to draw, &c. giving no power to the clerk to draw at any other time. With such an express provision, denying any right on the part of the clerk to proceed in the absence of the other officers, it may be a matter of doubt whether the provision is not to be considered more than directory. A very slight degree of evidence to show that the prisoner might have been injured or prejudiced by it, would undoubtedly entitle the prisoner to a new trial. I am inclined, however, in the absence of any such proof, and knowing that the case can be heard in the Court of Appeals at the next term of the court, to concur with Judge Leonard in his conclusions, that none of these irregularities are sufficient to call for a new trial.

GEQ. G. BARNARD, J. concurred.

Judgment affirmed.

[NEW YORK GENERAL TERM, November 7, 1865. *Ingraham, Leonard, and Geo. G. Barnard, Justices.*]

THE GROCERS' NATIONAL BANK OF THE CITY OF NEW  
YORK *vs.* CLARK.

A right of action to recover damages for the fraudulent misapplication or conversion of property by an officer or agent of a banking association, is *assignable*, and an action can be maintained by the assignee.

Such a right of action is assignable when the wrong is committed against a banking association, equally as if the property of an individual was thus misapplied or converted.

The attribute of assignability is not confined to rights of action belonging to natural persons; it extends with equal effect to those belonging to artificial persons.

THIS was an action to recover damages for the fraudulent misapplication or conversion of property by an officer or agent of a banking association, the Grocers' Bank, and for the arrest of the defendant. The Grocers' Bank was a state institution, formed under the general banking law. After the commission of the acts complained of, the Grocers' Bank was converted into the "Grocers' National Bank," under the laws of the United States, and by operation of the act of the legislature, of March 9, 1865, "enabling the banks of this state to become associations for the purpose of banking, under the laws of the United States," (*Laws of 1865, p. 171, § 6*;) and without any assignment or transfer, all the assets, real and personal, of the Grocers' Bank, were vested in, and became the property of the "Grocers' National Bank," the plaintiff in this action. An order of arrest having been granted, under section 179, subdivision 2 of the Code, the defendant moved to vacate the same. The motion was denied, at special term, and he appealed.

*Geo. W. Parsons*, for the appellant.

*Wm. A. Courseen*, for the respondent.

*By the Court*, CLERKE, J. The only question, among those presented on this motion, of which I entertained any doubt, on the argument, is that relating to the assignability of the demand.

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Atlantic Mutual Insurance Co. v. McLoon.

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This is nothing more or less than an action to recover damages for the fraudulent misapplication or conversion of property by an officer or agent of a banking association. If the property of an individual were thus misapplied or converted, there would be no doubt that the right to recover damages against the wrongdoer would survive to his executors or administrators, (2 *R. S.* 746, § 1, 5th ed.;) it would be *assets* in their hands. If he had assigned it, the claim would be recoverable by his assignee. In other words, it is assignable. Why, then, should not a claim for the same kind of wrong be equally assignable, and be equally deemed assets when the wrong is committed against a banking association. The attribute of assignability is not confined to rights of action belonging to natural persons; it extends with equal effect to those belonging to artificial persons.

The right of action, then, in this case passed as *assets* to the plaintiffs from the Grocers' Bank to the Grocers' National Bank, by operation of the act of 1865. (*Laws of 1865*, p. 171, § 6.)

The order should be affirmed; but I think the ends of justice will be sufficiently answered by holding the defendant to bail in \$20,000, &c.

[NEW YORK GENERAL TERM, January 2, 1866. *Ingraham, Clerks and Geo. G. Barnard, justices.*]

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THE ATLANTIC MUTUAL INSURANCE COMPANY *vs.*  
McLoon.

An action against a common carrier, to recover damages for the loss by negligence of goods entrusted to his care, is not an action arising on *contract*, within the meaning of section 227 of the Code of Procedure, authorizing the issuing of an *attachment* "in an action arising on contract for the recovery of money only."

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Atlantic Mutual Insurance Co. v. McLoon.

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**A**PPEAL from an order made at a special term vacating and setting aside an attachment.

*By the Court*, LEONARD, P. J. This action is for the recovery of damages for the loss by negligence of goods which the defendant undertook, as a common carrier, to convey from Boston to Hong Kong, China.

The plaintiffs obtained an attachment against the defendant, under section 227 of the Code of Procedure, alleging him to be a non-resident of the state of New York, and that he is indebted to the plaintiffs in the sum of \$13,000. The goods so lost are not stated in the affidavit upon which the warrant of attachment was obtained to be of any certain or definite value. It is stated therein only that the merchandise was of great value.

The plaintiffs further states in the affidavit, that the company insured the goods for \$13,000, and that the company paid the amount insured, and received an assignment and abandonment of all the interest of the party insured in said goods.

The warrant of attachment was, on motion at special term, heard upon the summons, complaint, warrant, affidavit and undertaking upon which the warrant was issued, vacated and set aside. The plaintiffs now appeal from the said order vacating the attachment to the general term.

The Code, as amended by the act of 1866, § 227, provides for the issue of an attachment, "in an action arising on contract for the recovery of money only, or in an action for the wrongful conversion of personal property."

All actions of a common law nature are for the recovery of money only, but as now limited, the action must also arise on contract. It is not pretended that the defendant has converted the goods, and we may dismiss all consideration of the question under the second branch of the subject referred to. No debt arises from the negligent loss of goods by a common carrier. He is not an insurer of the safe delivery of

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goods, notwithstanding he has contracted safely to carry them from one port to another. He is not required to make a delivery where he has been overtaken by an inevitable accident. He is held liable for loss by negligence, not from any contract against negligence; but because such a loss arises from a breach of duty imposed by the trust or agency which he has assumed. The loss in this case does not appear to have arisen from any contract, but from the negligence of the defendant in respect to his trust or agency. Neither the plaintiffs, or their assignor, have ever become a creditor of the defendant, in the sense of a debt arising on contract, so far as the facts appear in this case.

While the carrier has the goods safely in his possession, he holds them under a contract, and on demand by the owner, and satisfaction of the carrier's lien, an action would lie upon his contract under an ordinary bill of lading to safely carry and deliver the goods, in case of a refusal by the carrier to make a right delivery. The nature of the action is not the same when it arises from a negligent loss. The negligence is the cause of action, and it is in the nature of a tort, not much less culpable than it is for one carelessly to injure or destroy the property of another.

It seems to me entirely clear that there is no action arising on contract.

The order appealed from should be affirmed, with \$10 costs.

[NEW YORK GENERAL TERM, January 2, 1866. *Leonard, Ingraham and Clarke, Justices.*]

## MILLER vs. MILLIGAN.

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48b 30  
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88ap 56  
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To maintain an action for a malicious prosecution, the plaintiff must prove,  
1st. That the defendant instigated the prosecution against the plaintiff;  
2d. That such prosecution was without probable cause; 8d. That it was accompanied with malice, and terminated favorably to the party prosecuted. Malice, and a want of probable cause for the former suit, must *both* be alleged and proved. If there was probable cause, the action cannot be maintained, even though the prosecution complained of was malicious.  
Want of probable cause cannot be inferred from any degree of malice which may be shown.

If there is an absence of proof to show that the defendant was the real prosecutor in the former suit; or if he was, that he was without evidence or circumstances justifying a *reasonable suspicion* of the truth of the charge then made, the plaintiff should be nonsuited, and has no legal right to ask a submission of the facts to the jury.

Whether or not the defendant instigated the prosecution complained of, against the plaintiff, is a question of fact for the jury; and if there is *any* evidence whatever, upon that point, however slight it may be, the court is not authorized to dismiss the complaint and take the case from the jury.

What constitutes probable cause.

It does not depend upon the actual guilt or innocence of the accused, but upon the *belief* of the prosecutor concerning such guilt or innocence.

The real question is, whether the defendant had reasonable ground for believing that the plaintiff was guilty of the charge made against him. This belief may be founded upon facts within the knowledge of the party, or upon information derived from other persons.

If he has positive proof of the facts, in the affidavit of another, and he believes the truth of that person's statement, and proceeds against the plaintiff upon that proof, and under a belief in its truthfulness, he will be deemed to have had probable cause for so doing.

It is sufficient that such information was furnished to the defendant, as of itself would authorize and justify his action. The force and efficacy of the information will not be diminished by the introduction of evidence to show probable cause for the defendant's action, upon other and different grounds. If the testimony on the trial is conflicting and contradictory and cannot be well reconciled, the question whether there was probable cause should be submitted to the jury.

THIS cause comes before this court upon exceptions ordered to be heard at general term in the first instance. It is an action for malicious prosecution. The plaintiff was arrested, indicted, and tried in the district court of the United States,

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upon a charge of having, on the 23d day of November, 1863, at Windham, Greene county, induced one Shears to escape from the custody of the defendant, who had him under arrest as a deserter from the United States army. The plaintiff was acquitted upon the said trial, and brings this action to recover damages against the defendant upon the ground that the prosecution against the plaintiff was instigated by the defendant, and was without probable cause. The court nonsuited the plaintiff, who now applies for a new trial.

*D. K. Olney*, for the plaintiff.

*T. B. Westbrook*, for the defendant.

INGALLS, J. To maintain this action, the plaintiff was compelled to prove: 1. That the defendant instigated the prosecution against the plaintiff. 2. That such prosecution was without probable cause. 3. That it was accompanied with malice. (*Besson v. Southard*, 10 *N. Y. Rep.* 236. *McKown v. Hunter*, 30 *id.* 625.)

In support of the first proposition, the plaintiff proved the declaration of the defendant to the witness *William Fairchild*, who testified as follows: "I had a conversation with the defendant about Miller's arrest. I was coming from Poughkeepsie in the cars, and Milligan got into the cars and took a seat beside me in the car; he had a man with him. I said, *I hear that you had arrested Miller*. My wife had written to me while I was in the army, that you had arrested him, and that he was under heavy bail for helping a deserter to escape. *He said yes, that was so*. I asked him if it had been tried yet. He said *no*. I asked him how he thought it would go; that it must have cost Miller considerable. He said it would go well enough, *for he would make it cost him a nice pile before he got through, and he would learn him not to get another deserter off*. I told him I did not think Miller had any thing to do with it; he said he did.

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The affidavits upon which the warrant of arrest was issued were prepared by the defendant, who attended the trial upon the indictment, and was sworn as a witness for the prosecution, and sat beside the district attorney during the trial, *and advised and consulted with him.*

*James B. Olney* testified, that as counsel for Milligan he accompanied him to New York, where he was arraigned upon the indictment, and when they reached New York they saw the commissioner and district attorney. The witness further testified: "I was referred to *Milligan*, and was shown the affidavit which has been read in evidence. I endeavored to get the proceedings stopped, and have a nolle prosequi entered, *but could do nothing without seeing Milligan.*"

In opposition to this evidence, the defendant testified that he was clerk and special deputy of the board of enrollment, and was instructed by the board to draw his own and *Shears'* affidavits, which he did, and delivered them to *Joshua Fiero, Jr.* the provost marshal, who forwarded them to the United States district attorney in the city of New York, and had nothing further to do with it; and did not in any manner ask that a warrant issue against the plaintiff, and was not actuated by any malice in what he did; that he attended the trial in New York as a witness, under a subpoena, and not by the district attorney by request from him.

On cross-examination, he further stated: "I presented the case to *Fiero* before the affidavits were made; don't know what I told him. I spoke of the unfinished business in the office, and of this in that connection. I don't know as I urged him to have the affidavits made and forwarded to the district attorney; may have done so;" "will not swear I did not go to the district attorney about this case between sending the papers and issuing the warrant."

*Joshua Fiero*, the provost marshal, testified that the defendant stated to him the circumstances attending the escape of *Shears*, and he wrote to the district attorney for instructions, and directed the defendant to prepare the affida-

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vits, and when they were prepared, he sent them to the district attorney, and did not think he was influenced by Milligan to do so.

*George T. Pierce*, testified that the affidavits were prepared by order of Fiero and himself, and that he told Milligan to prepare the affidavits.

The plaintiff testified that on his way to New York, after the arrest, he, in company with Milo C. Osborn, saw Fiero at his store, who told him that the *defendant entered the complaint*, and that he advised Milligan not to make the complaint; and that he had had nothing to do with prosecuting the case; *that Milligan had*.

*Milo C. Osborn*, testified that he went to Fiero's store with the plaintiff. That Fiero said Milligan was the *complainant in the case*, and did not claim that he, Fiero, had any thing to do with it. The evidence upon this branch of the case is conflicting; but, in my judgment, it does not so clearly preponderate in favor of the defendant as to justify a refusal to submit the question to the jury. The positive admission of the defendant that he caused the arrest of the plaintiff, and that he would make it cost him a nice sum before he got through with the matter, is proved by one witness, and such declaration is consistent with the conduct of the defendant during the whole course of the prosecution.

Again, the declaration of Fiero in the presence of the plaintiff and Milo C. Osborn, is inconsistent with his evidence, and tends to weaken it, and presented a question appropriate for the consideration of the jury.

In regard to the second proposition, whether the prosecution was without probable cause:

In *Foshay v. Ferguson*, (2 Denio, 619,) in defining what constitutes probable cause, Bronson, J. remarks, "Probable cause has been defined, a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a *cautious man* in the belief that the person accused

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is guilty of the offense with which he is charged." The evidence upon that question is also conflicting. If the testimony of the defendant and Shears is to be adopted as the true version of the transaction at Miller's house on the 23d November, 1863, it is very clear that the defendant was fully justified in attributing to the plaintiff the effort to induce Shears to escape. But on the other hand, if the evidence of the plaintiff is to be credited, supported as it is by the testimony of Ryder, Peck, and Johnson, as to what occurred on that occasion, and also by the evidence of Osborn, as to what the defendant stated to him, and which is as follows: "*The next day after the escape, I had a talk with the defendant. He spoke about the deserter getting away. I asked him if he thought Miller had any thing to do with it, and he said no, I don't think he did;*" also his statement to William H. Steele, in substance, that he did not believe the plaintiff had any thing to do with the escape of Shears. I am quite as confident in the opinion that there was an entire absence of evidence to justify the belief, or well grounded suspicion, that the plaintiff caused, or participated in such escape.

If this view of the evidence is correct, it follows that the plaintiff was entitled to have that question also submitted to the jury.

In regard to the third proposition, whether the prosecution was accompanied with malice. If such prosecution was instigated by the defendant, and was without probable cause therefor, malice might be implied. In *Hall v. Suydam*, (6 Barb. 86,) Paige, J. remarks: "The want of probable cause cannot be inferred from express malice; *but malice may be implied from the want of probable cause.*" Again, if Fairchild is to be credited, there is direct evidence of malice. At all events, there was evidence upon that question which the plaintiff was entitled to have submitted to the jury. The plaintiff's counsel objected to the nonsuit, and requested the court to submit the several questions to the

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jury, which was refused, and the plaintiff excepted. The question then arises, was the nonsuit properly ordered?

In *Bulkeley v. Keteltas*, (6 N. Y. Rep. 384,) Gridley, J. says: "When there is no dispute about the facts, the question of the want of probable cause is for the determination of the court. Where the facts are controverted or doubtful, whether they are proved or not, belongs to the jury to decide; or, in other words, whether the circumstances alleged are true, is a question of fact." In *Besson v. Southard*, (10 N. Y. Rep. 239,) the court, in discussing the question of probable cause, remarks: "This question is composed of law and facts, it being the province of the jury to determine whether the circumstances alleged are true or not, and of the court to determine whether they amount to probable cause." (*Id.* 240.) "If the facts which are adduced as proof of a want of probable cause are contradicted, if conflicting testimony is to be weighed, or if the credibility of witnesses is to be passed upon, the question of probable cause should go to the jury with proper instructions as to the law." (See also *Stevens v. Lacour*, 10 Barb. 66.)

In *Masten v. Deyoe*, (2 Wend. 426,) Marcy, J. remarks: "If the testimony, uncontroverted and viewed in the most favorable light, would not authorize a verdict for the plaintiff, a judge is not obliged to submit the case to the jury; but he may, and it is generally conceded he should order a nonsuit. If in the exercise of this duty a judge withholds from the jury a cause which should have been submitted to them, this court always interferes and orders a new trial." (*Id.* 428.) "But nonsuits should only be granted in cases where there is nothing for the jury to pass upon, or where there is no evidence of a want of probable cause." (*Id.* 429.) "If, however, the facts are controverted, or in any wise the weight of conflicting testimony is to be ascertained, or the credibility of witnesses estimated, the evidence must go to the jury."

From a careful examination of this case, I am led to the

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conclusion that the evidence bearing upon the material questions involved in this controversy was too conflicting to justify the court in its refusal to submit the case to the jury under proper instructions in regard to the law. There are also questions of credibility raised by the evidence, which it is the province of the jury to pass upon. Assuming the evidence produced by the plaintiff to be true, I think it can hardly be doubted but that a cause of action was sustained within the reasoning of Justice Hogeboom, in *McKown v. Hunter*, (30 N. Y. Rep. 625,) in which the learned justice remarks: "This is an action for malicious prosecution, and its essential elements are want of probable cause and malice. These it belongs to the plaintiff affirmatively to prove, or to introduce evidence in regard to them from which they may be legitimately inferred." The evidence on the part of the defendant, while it tended to disprove the plaintiff's case, created an issue of fact which should have been submitted to the jury. I am, therefore, of opinion that the plaintiff should not have been nonsuited, and that a new trial should be granted, with costs to abide the event.

HOGEBOOM, J. The essential elements of this action are well understood. They consist of a previous *unfounded prosecution* of the plaintiff by the *defendant*, commenced *without probable cause*, conducted with *malice*, and *terminating favorably* to the party prosecuted. (*Vanderbilt v. Mathis*, 5 Duer, 304. *Foshay v. Ferguson*, 2 Denio, 617. *Besson v. Southard*, 10 N. Y. Rep. 236. *McKown v. Hunter*, 30 *id.* 627.)

In regard to these, the burthen of proof rests on the plaintiff, and he must establish each of these several propositions, or fail in his action. It is often said, in a general way, that malice and the want of probable cause are the ingredients of the cause of action; but it is plain that the other ingredients are implied or understood to exist. (*Vanduzor v. Linderman*, 10 John. 106. *McCormick v. Sisson*, 7 Cowen, 715.

*Bulkeley v. Smith*, 2 Duer, 261. *Van Latham v. Rowan*, 17 Abb. Pr. 238, 248. *McKown v. Hunter*, 30 N. Y. Rep. 627.)

Thus in general, very little is said about the *defendant* having been the prosecutor, because the question ordinarily is not the subject of dispute, and because, generally, the defendant was the adverse party in the action or proceeding which constituted the gravamen of the action for malicious prosecution. But it plainly lies at the very foundation of this action that the plaintiff must show that the *defendant*, and not somebody else, has prosecuted him—has been the *real party*, in fact, who has set on foot and conducted the proceedings against him. This prosecution may have been in the form of a civil action or of a criminal proceeding; and when not conducted in the *name* of the offending party, it would doubtless suffice to prove that he was the *real party*, the *mover*, and *manager* and *controller* of the prosecution. If he were the mere *clerk* or *agent* of others, or a mere *witness* in the transaction, he would not hold the character, nor be liable to the penalties, of a malicious prosecutor.

So the plaintiff must aver and prove that the prosecution claimed to be malicious is terminated in his favor. (*Gorton v. DeAngelis*, 6 Wend. 418. *Clark v. Cleveland*, 6 Hill, 844. *Hall v. Fisher*, 20 Barb. 441.)

Proof that the prosecution complained of was instituted through *actual malice* is not enough to sustain the action. (*Foshay v. Ferguson*, 2 Denio, 617.) In an action for malicious prosecution the plaintiff must allege and prove *both* malice and a want of probable cause for the former suit. If there was probable cause the action cannot be maintained, even though the prosecution complained of was malicious. Want of probable cause and malice must concur, and the former cannot be inferred from any degree of malice which may be shown. (*Besson v. Southard*, 10 N. Y. Rep. 236. *Bulkeley v. Smith*, 2 Duer, 261.)

I allude to these familiar rules not for the purpose of

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establishing their existence, but merely to bring to mind how strict and exacting the courts have been in enforcing them.

In the present case I was of opinion at the trial that in two at least of the particulars essential to constitute the cause of action, there was a lack of evidence to justify a recovery, and I am still of the same opinion. As there is a difference of opinion on that question, it will be indispensable to recur to the evidence.

1. Was there sufficient evidence on the point that the *defendant* was the party who had prosecuted the plaintiff? The charges in the complaint in substance are,

(1.) That Milligan *appeared* before United States Commissioner Osborn and *charged* Miller with having procured and enticed Shears to desert from the service of the United States.

(2.) That Milligan afterwards caused his arrest and imprisonment.

(3.) That Milligan afterwards appeared before a grand jury, at a circuit court in New York, and charged him as aforesaid, and caused him to be indicted for the aforesaid offense of enticing Shears from the service, and to be arrested and imprisoned therefor.

All these allegations were put in issue by the defendant, and I regard them as *wholly unproved*. There is *no evidence whatever* that Milligan ever *appeared* before the United States commissioner for any purpose, or there charged Miller with having enticed away Shears; or that he ever *caused* his arrest or imprisonment; or that he *ever* appeared before the grand jury, or on the trial of the indictment, otherwise than as a witness. Indeed there is no evidence that he ever *appeared* and *testified* before the grand jury, although there is evidence that he was *subpoenaed* to attend the grand jury and the trial *and went* both times. There is nothing whatever in his conduct on either of these two occasions which tends to implicate him in any way beyond any other witness. Moreover, what was done at the *trial* was not in the nature of a malicious *prosecution*; he was not the party, nor could

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he control the *proceedings* ; nor was he in anywise responsible for them further than as having *instigated and set them on foot*, and made himself the real prosecutor, *if he did so*; and that is the question in the case. The evidence on that question is all but unanimous and uncontradicted in favor of Milligan ; and I think the contrary would not support a verdict, and that the court would be bound to set it aside. If so, the plaintiff could not lawfully ask its submission to a jury.

(1.) The *defendant* swears that he drew up the affidavits (his own and Shears') by the *instruction* of the board of enrolment (being their clerk and special deputy ;) that he delivered the affidavits to the board ; that he had *nothing further* to do with it, and did not in *any way* or manner ask a warrant to be issued ; that Fiero, the marshal, sent the affidavits to New York.

(2.) Fiero, the marshal, expressly swears that *he instructed* Milligan to make his affidavit, and draw that of Shears, and that *he acted* under the instructions of the district attorney.

(3.) Pierce, the commissioner of the board of enrolment, swears that *he told* Fiero to prosecute Miller, and that the affidavits were prepared *by order* of Fiero and Pierce.

This testimony is substantially uncontradicted. A reference is made to the testimony of *Fairchild* and *Olney* as furnishing counter evidence, but its weakness and inconclusive character show it not to amount to a contradiction. Fairchild is one of those witnesses who is shown to have *enlisted* three or four times, when he was in each instance legally disqualified. He testifies to a *conversation* with Milligan in which he says to Milligan : " I heard that you had *arrested* Miller and that he was under heavy bail for helping a deserter to escape." Milligan said, " Yes, that is so." I regard this testimony as wholly *inconclusive*. The phrase " you had arrested Miller " might well refer to the action of the *board*, for whom Milligan was clerk, and not to the individual action of Milligan himself. Moreover an *arrest* by one party does not imply that the *prosecution* is by the same

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party. Milligan might well have *arrested* Miller, without having in any way been concerned in his prosecution. Many an innocent constable would be liable to an action for malicious prosecution if such were the rule.

The other testimony relied on is that of a highly respectable witness, Mr. Olney. But his testimony, which was as to the *conversations* of Mr. Milligan, tends directly to *exculpate* the latter. In that conversation, Milligan uniformly says he is *not* the prosecutor—that he had *nothing to do with it*, and was only a passenger : it is the *board*, (not himself.)

The only additional evidence is evidence admitted for another purpose, and wholly inadmissible as against Milligan, to wit, the evidence of Miller and Osborn, tending to show declarations of Fiero to them that *Milligan was the complainant*. However pertinent these might be to contradict Fiero, who swore that he had not made them, they were of no force whatever against Milligan.

It is therefore upon the flimsy evidence of Fairchild, susceptible of an entirely different and innocent construction, that the claim is made that it *must* carry the cause to the jury. I am clear, that it would not support a verdict, even if uncontradicted by three respectable men ; and that therefore the plaintiff was rightfully nonsuited, because he had not shown that the defendant had *prosecuted* him.

2. But I think the plaintiff failed on another point equally fatal to his case, to wit, in showing that there was a lack of *probable cause* for the prosecution. I am not quite satisfied with the definition of *probable cause*, contained in *Munns v. Nemour*, (3 Wash. C. C. 37,) and only quoted (not necessarily approved) in *Foshay v. Ferguson*, (2 Denio, 619,) to wit, “a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a *cautious* man in the belief that the person accused is guilty of the offense with which he is charged.” If by cautious man is meant one of *ordinary* caution or prudence, the definition is well enough, but if it means any thing more, I dissent from it. But in

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whatever aspect the case may be viewed, or whatever shape the definition may assume, I regard the undisputed facts as wholly insufficient to support the allegation of want of probable cause. Some of the facts are disputed. They may be laid out of view. Taking the undisputed facts, they present this case: a deserter from the U. S. service being in the custody of the defendant at the plaintiff's hotel, in Windham, escapes therefrom. It is charged that this was done with the connivance of the plaintiff. The deserter is seated in the bar room of the plaintiff's hotel, in which the plaintiff and others are seated; the deserter takes a seat by the side of the plaintiff, and enters into conversation with him; the plaintiff makes a motion or gesture with his arm, which might be construed as being directed towards the open door in the rear of the bar room. The plaintiff passes through that door himself, leaving it open. The deserter soon after follows, passing into the wash room—thence into the rear hall, and makes his escape through the back door. These are undisputed facts. Other facts, on which the complaint is also based, are those to which the defendant testified, that the plaintiff spoke to the deserter in opposition to the service—of the folly of going back into the army, and his advice not to do it, and other language of a similar tenor, also using other expressions importing political sympathy and the presence of friends in the bar room. Some two weeks after this, the deserter was rearrested by the defendant, and informed him that Miller advised, connived at and assisted in his escape, and had told him the doors would be left open for that purpose, and no noise made about it. This story is repeated to the board, when he arrived in Kingston, and was confirmed by the deserter's affidavit. On these statements the defendant says he relied, and believed them true. Can it be said that these facts—which were then as yet wholly uncontradicted—did not furnish *probable cause* for suspecting Miller of enticing away the deserter or conniving at his escape? For myself, I cannot see how the contrary can be maintained. The *belief* of the defendant in the

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truth of these facts (unless wholly incredible) would go far to sustain the existence of probable cause ; for he speaks *in part* of what he *actually knew*, and in *other respects* upon *information* corroborating facts known to himself. (*Foshay v. Ferguson*, 2 *Denio*, 620. *Seibert v. Price*, 5 *Watts & Sergeant*, 438.) The *information* received strongly supports the allegation of probable cause, and tallies with all the facts, and these two combined are sufficient to sustain the defense. (*Foshay v. Ferguson*, 2 *Denio*, 620.) The facts conceded by all—the actual and sudden escape—the open doors—the previous conversation in a low tone of voice with the plaintiff—the gesture directed toward the door—the retreat of the plaintiff in that direction—the quick escape of the deserter in the same direction—are of themselves pregnant with suspicion. It is no answer to say the deserter was a desperado, and his testimony and assertions alike unreliable. Evidence of this description is common in judicial proceedings—is frequently true and *often safely relied on* when confirmed from other sources. It is no answer to say that Miller was acquitted, notwithstanding the testimony of Shears, and the character of the latter, at the trial in the United States court, conceded to be susceptible of impeachment. It was necessary to show Miller's acquittal, to lay a foundation for the action. He could not proceed a step without it. (*McCormick v. Sisson*, 7 *Cowen*, 715. *Gorton v. De Angelis*, 6 *Wend.* 418.) This acquittal was not procured without effort. The trial occupied six hours. Two witnesses were sworn for the prosecution. *Five* were sworn for the *defense* ; the case was *summed up* on both sides ; a charge given by the court ; the jury *retired* under charge of a qualified officer, and afterwards returned into court and delivered their verdict. Circumstances less strong than those just mentioned which occurred on that trial have been held sufficient to repel the allegation of want of probable cause. (*Burlingame v. Burlingame*, 8 *Cowen*, 142.) In the last case cited, Judge Nelson (now of the U. S. Supreme Court) held at the circuit that calling witnesses and

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going fully into the defense was *an admission of probable cause*, and while the court *in banc* did not pass distinctly and *specifically* on that question, they held that the count for malicious prosecution could not be sustained. They say, "There is no sufficient reason for not believing that he [the defendant] was not persuaded of the truth of the facts related by him under oath; and though the plaintiff was acquitted, it is possible the defendant may have been correct; *at any rate his statement may be considered as probable cause.*" The alleged malicious prosecution was of an aggravated character, charging the plaintiff with the crime against nature, and so far as we can perceive, supporting it only by his own oath. And, yet, probable cause was held to be proved.

Some stress is laid in argument upon the fact that the defendant in his affidavit stating the transaction does not profess to found the charge or his belief of the plaintiff's guilt in part or at all upon *information* obtained from Shears. But it was not necessary to make that reference. Shears' affidavit was *cotemporaneously* taken, and both were used together, and not either alone, as the foundation of the criminal prosecution.

Stress is also laid upon the fact that three or four witnesses, besides the plaintiff, contradicted the defendant on the trial, in regard to material portions of his affidavit which was laid before the grand jury. The answer to this is, I think, *twofold*. (1.) Assuming this contradiction to exist, there are nevertheless abundant facts remaining to repel the imputation of want of probable cause. (2.) The contradiction, except in the case of the plaintiff himself, is rather *apparent* than real. Milligan swears to certain facts; for example, that Miller said Shears was a d—d fool to go back into the army and fight for Abe Lincoln and his nigger war, and he would not do it, and that he was a democrat and Shears had a plenty of friends there. It must be conceded that Miller denies these statements, in an unqualified manner; but as to the other witnesses their testimony is liable to

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this criticism. (1.) Rider does not *expressly* appear to have been there the whole time; and it is *obvious* that Miller and Shears may have had a conversation which he *did not hear or observe*. This remark is applicable to the other witnesses, Peck and Johnson, both of whom expressly qualify their contradiction by the expression *so far as they saw or heard*. Peck left the bar room ten or fifteen minutes *before* the escape, and Johnson found the parties there when he got there. It was therefore *possible* for every thing which Milligan said to be true without contradicting any of the witnesses except the plaintiff himself.

This, so far as I know, is the whole evidence upon which the allegation of a want of probable cause rests. I think it would be unsafe as a matter of practice, and inconsistent with the theory upon which this action is based, to allow a recovery in a case of this description. The defendant has, I think, shown probable cause for the prosecution if he is its author, and the plaintiff (which is the real question) has not shown the want of probable cause for the charge. On both of the grounds, the absence of proof to show that the defendant was the *real prosecutor*, and if so, that he was without evidence or circumstances justifying a *reasonable suspicion* of the truth of the charge; I am of opinion that the plaintiff was properly nonsuited, and had no legal right to ask a submission of the facts to the jury.

On the other ingredient which enters as a component part into this cause of action, that of *malice*, I have not thought it necessary to dwell. *Perhaps* there is evidence justifying the submission of that question to the jury, whether or not it would be sufficient to carry a verdict. There is *more* evidence on that point, I think, than on the others, but as the action requires each and all of the three *supports* before named, in order to *stand*, and lacks two of them, I think it must *fall*.

The evidence of Shears' declarations to Milligan on and after his re-arrest, tending to show the truth of the *charge*

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(if any) which constituted the foundation of the alleged malicious prosecution, was properly received. They were eminently calculated, if believed, to raise a strong suspicion of the crime (that of enticing away a deserter) with which Miller was charged, and it is just precisely this kind of evidence (to wit, *information* of the facts,) which often tends most strongly to repel the charge of want of probable cause. (*Foshay v. Ferguson*, 2 *Denio*, 617.)

Nor was the objection to the admission of evidence of the U. S. District Attorney's *declarations* that Shears' character was notoriously bad, and that he would not hang a dog on his evidence, erroneously overruled. The district attorney could not by his declaration make or unmake a character for Shears; especially to affect Milligan thereby. So far as the evidence could possibly be regarded as pertinent (if at all) it was allowed to be introduced to show the *act* of the district attorney as a proceeding on the trial dispensing with proof of impeachment of the character of Shears.

I think no legal error was committed at the circuit, and that a new trial should be denied, and the defendant have judgment.

MILLER, J. As there is a difference of opinion among my brethren upon the questions arising in this case, I purpose to examine briefly the points of disagreement between them.

The first question which arises is, whether the defendant instigated the prosecution against the plaintiff. The main testimony, I think, to sustain this view of the case is the evidence of the witness Fairchild. According to his testimony, the defendant stated to him that he had assisted the plaintiff, which would not alone imply that he had originated the prosecution, because the arrest may have been made at the instigation of others, and in the discharge of an official duty. But he went a little further, and said that he would make it cost him a nice pile before he got through, and he would learn him not to get another deserter off. In this last

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remark, the defendant spoke as if *he* personally had the control of the matter; of what *he* could do in putting the defendant to expense, and what *he* would learn him. All this would seem to convey an idea that *he* was the author, originator and the controlling spirit of the prosecution. All the evidence but this is, I think, sufficiently explained. It is shown, quite clearly, that he acted under direction of the board of enrolment in drawing the papers, and that so far as the trial of the plaintiff, and any thing connected with it, is concerned, it was conducted by other parties, and the defendant occupied entirely a secondary position, and, as he expressed himself to one of the witnesses, he was only a passenger.

The evidence to contradict Fiero only bears upon the weight to be given to his evidence, and cannot be considered as controlling.

Laying aside, then, the other testimony, we are driven to consider the evidence of Fairchild as bearing upon the question now under consideration. It is not to be denied that he does not present himself in a very advantageous light, as it appears that he had several times enlisted, and been discharged for physical defects not apparent to others, but known to himself, and which he must have concealed before he could have passed inspection, and been admitted into the service. This, however, is a matter which affects his credibility and the weight which should be given to his testimony. As it stands, I am not prepared to say that it is so glaringly inconsistent with the truth, and palpably false and untrue, that we are at liberty to disregard it for that reason. The most that can be claimed, I think, is, that this was a question for the consideration of the jury. It was mere evidence at least, and its strength and weight should be determined by the jury, and not by the court. So long as there was any evidence whatever, however slight it might be, the court was not authorized to nonsuit and take the case from the jury.

As there was some evidence, then, upon this point, I think the plaintiff did not fail in establishing this branch of his case.

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The next question which arises is, whether there was probable cause for the prosecution. The authorities are very explicit as to what constitutes probable cause. It is defined to be a reasonable ground of suspicion supported by circumstances sufficiently strong to warrant a belief of guilt. (*Foshay v. Ferguson*, 2 Denio, 619.) It does not depend upon the actual guilt or innocence of the accused, but upon the belief of the prosecution concerning such guilt or innocence. (*Seibert v. Price*, 5 Watts & Sergeant, 438.) The plaintiff must establish that there is no color for the charge. (2 Sand. on Pl. and Ev. 663.) The real question, then, is, whether the defendant had reasonable ground to believe that the plaintiff was guilty of the charge made against him. His belief may be founded upon facts within the knowledge of the party, or upon information derived from other persons.

In reference to the facts presented upon the trial, it cannot be denied that the testimony as to most, if not all, of them, is conflicting and contradictory. The plaintiff swears quite positively to a history of the transaction which occurred at the time of Shear's escape, which establishes that he was entirely innocent of the charge made against him. He is supported in his statement by the testimony of several witnesses. The defendant contradicts the plaintiff, and the statement of his witnesses in every material part. There is a direct conflict which cannot well be reconciled, and in such a case the question arising as to whether there was probable cause, must go to the jury. (*Reagan v. Southard*, 6 Seld. 240.) In the light in which I view the undisputed facts, they establish that Shears was a deserter, and that he was arrested by the defendant, and taken to the plaintiff's public house. He was in the bar room of the plaintiff's hotel, where a number of persons, including the plaintiff, were present. He took a seat by the side of the plaintiff, and a brief conversation took place between them. So far all the witnesses agree, and the facts are not controverted. But here the conflict in the testimony commences. According to the plaintiff's

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evidence, nothing else occurred which indicated his complicity with the abrupt flight of Shears. If the defendant is to be believed, and Shears, not only considerable conversation took place, but the plaintiff directly aided Shears in escaping.

Among other facts, the defendant swears that the plaintiff made a motion with his hand towards the door of the room out of which the deserter escaped, as if to indicate that he could leave in that direction. The plaintiff distinctly denies this very important fact, which might well be considered, if true, as warranting a belief that the plaintiff was engaged in assisting Shears in getting out of the custody of the officer. And I understand the plaintiff's witnesses corroborate his statement. The plaintiff having positively denied the defendant's statement in this respect, I do not well see how it can be considered as an undisputed fact; and I think as the evidence stood, upon that point, it was a fair question for the jury to determine whether any such occurrence had ever transpired. If the plaintiff had previously passed through the same door, as is claimed, leaving it open, in the absence of any act of his, confessedly proven, that circumstance was of but little consequence. It would not establish his guilt or connivance in the deserter's escape, or furnish a reasonable ground of suspicion.

If we consider, then, the facts which were not contradicted, they do not, in my opinion, establish a state of facts which would authorize a *belief* that the plaintiff was guilty. He was in his own house, where he had a perfect right to be.

The fact that the deserter conversed with the plaintiff, as he did with others present upon that occasion, would not furnish a reasonable ground of suspicion, or authorize any action on the part of the defendant, against the plaintiff. So far as the undisputed facts show the acts and conduct of the plaintiff at the time in question, they were not of a character to warrant a belief of guilt, or to authorize the plaintiff's arrest; and the defendant cannot sustain his defense upon any such basis.

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As to information derived from another party, which authorized a belief on the part of the defendant that the plaintiff was guilty of aiding in the escape of Shears, the testimony shows that Shears, when subsequently arrested, stated to the defendant to the effect and in substance, that the plaintiff had encouraged and aided and abetted his escape. He ratified and confirmed this statement by an affidavit, and also testified to it when sworn as a witness upon the trial of the plaintiff on the indictment against him in the United States Court.

This information, with the circumstances surrounding and connected with the escape of Shears, if believed and acted upon by the defendant, would no doubt justify the arrest. The affidavit of Shears furnished positive proof of the fact. The defendant swears that he believed the truth of his statement, and if he proceeded against the plaintiff upon that proof, and under a belief in its truthfulness, then he had probable cause for so doing.

The inquiry suggested itself, whether it can be said that he did not thus proceed, because he testifies to knowledge of the plaintiff's acts, which is contradicted by other proof? Conceding that his statement as to what he actually witnessed himself is contradicted, the information which he received from Shears under oath still remains, which alone would have justified the action of the defendant. I do not well see how this can be stricken out of the case, and that we are bound to assume that because the defendant may have made a mistake in his evidence, and his testimony is contradicted as to what he actually saw and heard, he is for that reason to be deprived of the benefit of the information thus communicated to him.

It certainly would be going very far to say that because Shears was a desperate character, for that reason the affidavit which he made must have been procured by the defendant unfairly and for the very purpose of instituting this prosecution.

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In the absence of any direct evidence that such was the case, I am inclined to think that the information communicated by Shears to the defendant furnished a reasonable ground for a belief that the plaintiff was guilty, and probable cause for this prosecution.

I am not aware of any rule by which the statement made by Shears can be considered as balanced, outweighed or rendered of no effect because the statement of the defendant may have been impaired by other testimony.

It is sufficient, I think, that there was such information furnished to the defendant, which, of itself, would authorize and justify his action. And its force, strength and efficacy are not diminished because evidence is introduced to show probable cause for his action upon other and different grounds.

While either would have been sufficient, a failure to establish one does not necessarily destroy the effect of the other.

Whatever may be the circumstances of aggravation attending a case of this character, and however unjust the accusation towards an innocent person, the rules of law which apply cannot be disregarded. And as it is clear that the information communicated was enough to justify a belief of the guilt of the plaintiff, and furnished probable cause for his arrest, the nonsuit was properly granted at the circuit.

As the plaintiff failed to establish one of the most essential ingredients of this cause of action—a want of probable cause—it is not necessary to discuss the question whether there was evidence of malice.

I discover no error in the admission of evidence upon the trial, and I think a new trial must be denied, with costs.

New trial denied.

[ALBANY GENERAL TERM, March 5, 1866. *Miller, Ingalls and Hogeboom, Justices.*]

**BELL vs. PIERCE and others.**

The plaintiff was the owner of a summer residence in one of the towns of Erie county, and a winter residence in the city of Buffalo. He resided in the city with his family, until the month of June, when he went, with his family, to the residence in the country, where they remained during the summer. His principal business was carried on in the city, to which he attended personally, going to his family at night, and returning mornings. The defendants, as assessors of the town where he had his summer residence, in the year 1864, assessed him for personal property, not knowing that he had or claimed any other residence. The tax was levied and collected of the plaintiff on said assessment, and he brought this action to recover the money back. *Held* that the action could not be maintained, even though the assessment was erroneous.

**T**HIS is a motion for judgment on a verdict taken subject to the opinion of the court at general term. The defendants were assessors of the town of West Seneca, in the county of Erie, in the year 1864. They assessed the plaintiff as a taxable inhabitant of that town for both real and personal property. The assessment roll was in all respects regular in form, and the board of supervisors of that county in due form assessed and levied the taxes for collecting which this action is brought. The plaintiff was the owner of a dwelling house in the city of Buffalo, and also of a dwelling and twenty acres of land in West Seneca. In the year 1864, he resided in said city of Buffalo, with his family, until about the 30th of June, at which time his house was closed in the city and the plaintiff's family moved to the residence in West Seneca, to remain through the summer months; and this had been the custom of the plaintiff for several years.

The plaintiff's principal business was that of an iron founder and machinist, and that business was wholly carried on in Buffalo. The plaintiff was accustomed to attend personally to his business in Buffalo, going to his family in West Seneca at night, and returning to Buffalo mornings, except that occasionally he spent a night at his house in Buffalo. The defendants had no knowledge before they delivered the assessment roll to the supervisor of their town

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that the plaintiff had, or claimed to have, any residence except in West Seneca. They gave the statutory notices of the completion of the roll, and of their meetings to correct the same, and no one appeared before them to object to the regularity of the plaintiff's assessment. The plaintiff was not assessed for personal property in Buffalo.

*S. S. Rogers*, for the plaintiff.

*P. G. Parker*, for the defendants.

*By the Court*, DAVIS, J. The first duty of the assessors was to ascertain the taxable inhabitants of their town.

The statute declares that between the first days of May and July in each year the assessors shall proceed to ascertain by diligent inquiry, the names of all the taxable inhabitants in their respective towns or wards, and also all the taxable property, real or personal, within the same. (1 *R. S.* 5th ed. 709, § 8.) It is now well settled that this is a judicial duty, for an error in which no action will lie. (*Vail v. Owen*, 19 *Barb.* 22. *Brown v. Smith*, 24 *id.* 419.) And the contrary doctrine in *Prosser v. Secor*, (5 *Barb.* 607,) has been distinctly overruled by this court, as it is also understood to have been by a late decision of the Court of Appeals.

In *Mygatt v. Washburn*, (15 *N. Y. Rep.* 316,) it was held, in substance, that the assessment "should be considered as made at the expiration of the time limited for making the inquiry by the assessors, namely, the first of July;" and that a person not a resident of the town at that time was not within the jurisdiction of the assessors. It is settled by that case that assessors are liable to an action if they make an assessment upon which a tax is subsequently enforced against a person who is in fact not a resident of their town at the time the assessment is made, although he may have been such resident at a previous time within the period of inquiry. It is to be observed that that case turned altogether upon the

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fact that the party assessed was not a resident of the town at all, and so could not have been a "*taxable inhabitant*" over whom, or whose property, the assessors could have any jurisdiction.

But a far different question arises where the person assessed in fact is an inhabitant of the town when the assessment is made. In the latter case the assessors are by statute clothed with jurisdiction to inquire and determine whether he is *taxable* or not, and upon what property and upon what valuation. As soon as it is settled that the person is a *resident* or *inhabitant* of the town (for the words are used as convertible terms,) the assessors are called upon to exercise their judicial powers in the inquiry and determination as to his liability to assessment and taxation, for the exercise of which they are not liable to respond in an action. In this case it is manifest that the plaintiff was an inhabitant of the town of West Seneca on the first day of July, 1864. He was the fortunate owner of a summer and winter residence, and when he moved in June into the former to remain for the summer months, he became *de facto* a resident of the town of West Seneca, and subject to the jurisdiction of its assessors. For some other purposes his legal residence might remain in the city of Buffalo, but for the one under consideration the statute looks only to actual inhabitancy for some permanent period and purpose at a prescribed time, to wit, the first day of July. He was also a *taxable inhabitant*, for he was the owner and occupant of his house and twenty acres of land in West Seneca, which could not be taxed as non-resident or unoccupied lands, but only as resident and occupied. When, therefore, the assessors found him and his family in occupation of his dwelling and lot of twenty acres in their town, they had the fact of inhabitancy established which set in motion their duty to inquire whether the plaintiff was taxable, and for what property.

No objection is or can be made that in exercising their jurisdiction they committed any error in assessing the plaintiff for his real estate so occupied by him. But it is claimed

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that the fact that he resides for a part of the year in another town or ward in which his principal business was carried on, prevents the attaching of any jurisdiction to assess his personal property.

The statute declares that every person shall be assessed "in the town or ward where he resides when the assessment was made;" but "in case any person shall reside during any year in which taxes may be levied in two or more counties, towns or wards, his residence, for the purposes within the meaning of this section, shall be deemed and held to be in the county, town or ward in which his principal business shall have been transacted." This statute was obviously enacted to meet cases similar to the plaintiff's, where persons had two or more residences in different towns or counties, in which they are accustomed to reside at different periods of the year. It assumes that the actual inhabitancy or residence may be, at the time the assessors are to act, in a town different from that in which the principal business is carried on; and it therefore recognizes the existence of the fact upon which the general jurisdiction of the assessors arises. It still leaves the duty upon the assessors to inquire whether an inhabitant or resident of their town is a taxable inhabitant as to his personal property; and makes that question dependent upon the extrinsic fact, to wit, whether the party has not another residence where his principal business is carried on. If he has property he is *prima facie* taxable, because of his actual residence, and his exception from the general rule depends upon the fact that he has "during the year" another residence, and the further fact that his principal business is carried on at the latter. The assessors are called to pass upon both of these questions before they are at liberty to omit his assessment for personal property; and if the party carries on business at several places at which he has resided they are to determine the not always easy question, to wit, which is the principal business, within the meaning of the law. Under the general rule of the statute, the personal

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property follows the person to his actual residence at the time the assessment is made, and this fact confers the requisite general jurisdiction both of the person and property; and in determining all questions of exception from this general rule the assessors act judicially, and are shielded by the general rule that protects officers of that class.

In *Brown v. Smith*, (24 Barb. 419,) the plaintiff's farm lay in two towns and two counties, the dividing line of which ran through it. The plaintiff claimed to reside in the town or county in which the defendants were not assessors, and he established his claim at the trial; but the court held that the defendants had a general jurisdiction over that portion of the farm lying in their town, and were bound to inquire judicially whether the owner resided on their side of the boundary, or on the other, and that their error in determining the question did not subject them to an action. This was carrying the principal further than is necessary in this case, because in that case the question seems to have been one of actual residence, which in this case is not disputed.

In *Vail v. Owen*, the late Mr. Justice Greene, in pronouncing the opinion of this court, discussed the question when assessors are to be considered as acting judicially, with singular clearness and ability, and his views seem to be conclusive of this case. "I submit" said he, "for all purposes of assessment, the assessors have jurisdiction over all the inhabitants of their town; that the inquiry which they are required by the 8th section to make preparatory to their assessment is a judicial act, and that no action can be maintained against them for any error which they may commit in the performance of that duty; for such error the party aggrieved must seek another remedy."

In my opinion the defendants, on finding the plaintiff an actual resident of their town, had jurisdiction to inquire whether he was not also a taxable one as to his personal property. It was the plaintiff's duty to have made known to the assessors that he had another residence and a "prin-

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cial business" elsewhere which took his personal property with them for purposes of taxation ; and that his neglect to do this had been the sole cause of his alleged injuries, which neither justice or law will permit him to charge over upon the defendants.

In my opinion judgment should be entered for the defendants.

[ERIE GENERAL TERM, September 3, 1866. *Grover, Daniels, Marvin* and *Davis*, Justices.]

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## AMES vs. HARPER and GAGE.

Where, in an action of ejectment it appears from the complaint that the relation of landlord and tenant exists between the defendants, and they omit to set up the misjoinder, in their answer, it is too late on the trial to successfully raise that question. It will be presumed, in such a case, that the landlord intended to waive that objection, and elected to remain a party defendant in the action.

The plaintiff claimed title under a deed from C. to him, purporting to convey the premises in question, and then proved by R. that he (R.) hired the premises of one S., who assumed to let the same as the agent of C. and that he had paid the rent to S. There was no evidence that either C. or the plaintiff ever occupied the premises, or that either of the defendants entered under C. or the plaintiff, or in any manner recognized their right to the premises. *Held* that the bare assertion of R. that S. assumed to rent the premises to him, as the agent of C. was inadmissible as against the defendants, and proved nothing against them ; and that the plaintiff had failed to establish a cause of action.

THIS is an appeal from a judgment rendered in favor of the plaintiff upon the report of a referee. The action was brought to recover the possession of lot No. 35, Franklin street, in the city of Albany. The material facts are stated in the following opinion.

*A. Brigham*, for the appellants.

*O. Meads*, for the respondent.

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*By the Court, INGALLS, J.* The complaint alleges that the defendant Gage was in the actual possession of the premises as the tenant of the defendant Harper. The defendants, in their answer, admit such occupation by Gage, as the tenant of Harper, and deny each and every other allegation of the complaint. They also allege that Harper was the owner in fee, and lawfully possessed of the said premises. The appellants insist that Harper was improperly joined as defendant, he not being in the actual possession of said premises, and that the referee erred in refusing to dismiss the complaint, as to him. We are of opinion that, as by the complaint it appeared that the relation of landlord and tenant existed between him and Gage, and the defendants omitted to set up in their answer such misjoinder, it was too late on the trial to successfully raise that question. It must be assumed that Harper intended to waive that objection, and elected to remain a party defendant in said action. The precise question was thus decided by this court, at the September general term, 1866, in the case of *Garrett Abeel v. Peter Van Gelder and Ezra Shoemaker*; see also *Fosgate v. Herkimer Man. Co.* (12 N. Y. Rep. 580.) In *Pulen v. Reynolds*, (22 How. 355,) Allen, J. referring to the case above cited, (12 N. Y. Rep. 580,) remarks: "The misjoinder was treated as waived by the answer of the landlord, and the appearance of the landlord, without objection, was equivalent to an election to be made a party under the statutes."

It was the duty of Harper, when he was apprised by the complaint that he was made a party *because he was the landlord*, to have set up in his answer the misjoinder, instead of expressly admitting the relation and proceeding to trial upon the issue thus formed.

The appellants further insist, that the plaintiff should have been nonsuited for failure to show that he had title or a right to the possession of the premises, and we are of opinion that, in this, the defendants are correct. The plaintiff gave in evidence a deed, executed by Ezra Crane and wife, to him,

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April 16, 1859, purporting to convey the premises in question, and then proved by one Reed that he hired the premises of one Stocker, *who assumed to let the same as the agent of Crane*. This evidence was objected to by the defendant's counsel. Reed further testified, that he paid the rent to Stocker, who is dead. There is no evidence that either Crane or the plaintiff ever occupied the premises, or that either of the defendants entered under Crane or the plaintiff, or in any manner recognized their right to the premises. Harper claimed title from the tax sale, and Gage defended as the tenant of Harper. The only evidence of possession, or the right to such possession, by the plaintiff or Crane, rests upon the bare assertion of Reed, that Stocker assumed to rent the premises to Reed as the agent of Crane. This evidence was inadmissible as against the defendants, and when admitted proved nothing against them. This evidence would probably have concluded Reed, but not the defendants, who are in no manner connected with either Crane, Reed or the plaintiffs, but, on the contrary, claim under the tax sale, and in direct hostility to the plaintiff. The plaintiff, therefore, failed to establish a cause of action against either of the defendants. This result renders it unnecessary to pass upon the validity of the tax sale.

A new trial should be had, with costs to abide the event.

[ALBANY GENERAL TERM, September 17, 1866. *Miller, Ingalls and Hogeboom, Justices.*]

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*VAN AKIN vs. CALER.*

Where it is claimed, in an action for slander, that the explanatory matter which accompanied the slanderous words, so qualified them that the crime in question was not imputed, it must be shown that the explanation not only accompanied the words, but that they were sufficiently explicit to enable those who heard the same reasonably to understand to what the words uttered referred; and that the crime which the words, standing alone and taken in their natural and ordinary meaning, would impute, was not intended to be charged.

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The party who utters words imputing to another crime, must be presumed to intend what the words naturally import; and it is but just to require that the explanation be made sufficiently definite to prevent an erroneous impression unfavorable to the party against whom the charge is made.

**T**HIS is a motion for a new trial, upon a case. The action is for slander, and the complaint alleges in substance that the defendant charged the plaintiff with the crime of larceny. A verdict was rendered in favor of the plaintiff for \$130. The action was tried before Justice HOGEBROOM at the Ulster circuit, in March, 1865. The exceptions were ordered to be heard in the first instance at general term.

*T. R. Westbrook*, for the plaintiff.

*Mr. Stebbins*, for the defendant.

*By the Court*, INGALLS, J. The complaint alleges that the defendant spoke of and concerning the plaintiff the following words: "You are a thief." "you are a damn thief." The evidence proves the utterance of the words charged, and they impute the crime of larceny, and are actionable.

The court charged the jury that the plaintiff was entitled to a verdict, and the only question for them to determine was the amount of damages. To this charge the counsel for the defendant excepted. The defendant's counsel requested the court to charge the jury that if they believed that the language complained of, and in question, was intended and understood to relate to the difficulty about the pay roll, their verdict should be for the defendant. The court refused so to charge, and the defendant's counsel excepted.

This case is to be considered upon the two exceptions. The defendant's counsel insists that the explanatory matter which accompanied the slanderous words, so qualified them that the crime of larceny was not imputed; or at least that it was for the jury to determine whether or not such crime was charged.

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To justify the application of this principle, the explanation must not only accompany the words, but should be sufficiently explicit to enable those who hear the same, and who are presumed to acquire all their knowledge of the transaction from what is said at the time, reasonably to understand to what the words uttered refer, and that the crime which the words, standing alone and taken in their natural and ordinary meaning, would impute, was not intended to be charged. Short of this the application of the principle contended for by the defendant would be dangerous indeed. The party who utters words imputing to another crime, must be presumed to intend what the words naturally import, and it is but just to require that the explanation be made sufficiently definite to prevent an erroneous impression unfavorable to the party against whom the charge is made. The witness, William Still, who was present and heard the conversation, testifies: "I did not understand his remarks as relating to the pay roll." The testimony of the plaintiff is to the same effect. The defendant by his evidence leaves the matter at least equivocal; he testifies as follows: "I did say he was a thief, and damned thief, and any man was who would do that." The dispute appears to have been in regard to the pay roll, but the difficulty with the defendant's case is, that if he merely intended to charge the plaintiff with want of fidelity in regard to the work, he should have conveyed his meaning in language as unequivocal as was used by him in charging the plaintiff with larceny; or at least so that the explanation would be understood. The direction to the jury was in my judgment justified, as it is not the duty of the court or the jury to give language a strained or unnatural construction for the purpose of shielding a party from the consequences of uttering a charge so grave and so well calculated to injure character.

The request to the judge to charge the jury was too indefinite, and if acquiesced in, would probably have misled the jury. When a party desires to have a question of fact sub-

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mitted to the jury, the attention of the court should be particularly directed to it, and the request should be specific. (*Dow v. Rush*, 28 Barb. 157. *Carpenter v. Stilwell*, 11 N. Y. Rep. 61. *Moore v. Meacham*, 10 id. 212.) In the last case Gray, J. says: "A judge is not required to express an opinion, much less to charge as to a belief, when, as in this case, the evidence would not warrant a peremptory ruling of the point in favor of the party seeking to establish it." This remark applies with peculiar force to the case at bar. (*See also Winchell v. Hicks*, 18 N. Y. Rep. 565.)

A new trial should be denied with costs.

[ALBANY GENERAL TERM, September 17, 1865. *Miller, Ingalls and Hogeboom*, Justices.]

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## VAN RENSSELAER vs. OWEN.

The section of the Revised Statutes, providing that "if the right or title of a plaintiff in ejectment *expires* after the commencement of the suit, but before trial, the verdict shall be returned according to the fact; and judgment shall be entered that he recover his damages by reason of the withholding of the premises by the defendant, to be assessed; and that as to the premises claimed, the defendant go thereof without day," does not apply to an action of ejectment for the non-payment of rent, brought by the plaintiff as devisee of the lessor, against the defendant as devisee of the lessee, where the plaintiff, after the commencement of the action and before trial, conveys to third persons all his right and interest to and in the claims involved in the action, and in the premises in controversy.

The plaintiff's title, in that section, has reference to the *estate* or interest in the premises, which for the time being is in the possession of, or represented by, the plaintiff, and not merely to the *person* who is *at the time* the owner of the estate. It is the *title upon which a plaintiff seeks to recover*.

If the *estate expires*, that is, cease or come to an end, the defendant should, as to the premises claimed, go thereof without day, and the plaintiff recover his damages for the unlawful withholding, up to the estate terminated; but if the estate continues to exist, though in other hands, the defendant should be permanently discharged from liability therefor; while the plaintiff, if he recovers them, recovers them as trustee in fact of him who since the commencement of the action has become the real party in interest.

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**A**PPEAL from a judgment ordered at the circuit, on a trial before the court without a jury. The action was brought to recover the possession of real estate. It appeared upon the trial that on the 28th day of January, 1792, Stephen Van Rensselaer, the father of the plaintiff, and Joseph Owen, the father of the defendant, executed an indenture under seal, by which the form granted to the latter in fee, reserving the rents mentioned below, certain lands described in the complaint, situated in the town of Berne, in the county of Albany, which were occupied by the defendant at the commencement of this action, and to recover the possession of which this action was brought. In that indenture Owen, for himself, his heirs and assigns, covenanted to pay to the said Van Rensselaer, his heirs and assigns, yearly, on the 2d day of January, twenty-six skipples of wheat, four fat fowls, and perform one day's service with carriage and horses, to be delivered and performed at the mansion house of said Van Rensselaer, in Watervliet. The indenture also contained the usual claims, giving the right of re-entering to the grantor, his heirs and assigns, in case of want of sufficient distress, and also in case of non-payment of the rent by Owen, his heirs or assigns.

Owen entered, under said grant, and occupied the premises, paid rent, and died, in February, 1841, devising the premises so granted, to his son, the defendant, who had occupied them ever since. Van Rensselaer died in January, 1839, devising all his lands, tenements, hereditaments, real estate, rents, &c. in Albany county, to his son, the plaintiff. On the 2d of January, 1864, a little before sunset, the plaintiff, through his agent Lansing, who acted under a power of attorney, dated February 24, 1852, made a formal demand, at the front steps of the mansion house mentioned in the indenture, for the rent falling due on that day, and the rent was not paid, nor the demand complied with.

It appeared that on the 2d day of March, 1862, the plaintiff made a contract with reference to this lease, among others,

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with James Kidd and others, and in May, 1864, after this action was commenced, conveyed and assigned to James Kidd and Peter Cagger all his claims in this action, and in the premises in controversy.

The defendant moved to dismiss the complaint, to which decision the defendant excepted. And the judge having found in favor of the plaintiff, the defendant excepted to such finding.

*A. Bingham*, for the appellant.

*S. Hand*, for the respondent.

HOGEBROOM, J. So far as I can discover, all the points raised by the defendant on this appeal have been decided against him, either in this court or the Court of Appeals, except that arising on the deed of conveyance made by the plaintiff to James Kidd and Peter Cagger, on the 2d of March, 1864, (after the commencement of this action,) conveying to them all his right and interest in the claims involved in this action, and in the premises in controversy. On this point I entertain an opinion unfavorable to the defendant, and cannot concur in the position taken by him, that the plaintiff's title had expired, and that the complaint should have been dismissed.

I will briefly express my reasons for reaching this result. The position in question, is founded upon that section of the Revised Statutes which provides that if the right or title of a plaintiff in ejectment, *expire* after the commencement of the suit, but before trial, the verdict shall be returned according to the fact; the plaintiff recover his damages for the unlawful withholding of the premises; and that as to the premises claimed, the defendant go thereof without day. (2 R. S. 308, §§ 24, 31.)

The construction to be given to this language turns upon the meaning to be applied to the words "the right or title

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of a plaintiff," and the word "expire." The plaintiff's title, in this connection, has reference, in my opinion, to the *estate* or interest in the premises, which for the time being is in the possession of, or represented by, the plaintiff, and not merely to the *person* who is *at the time* the owner of the estate. It is, as expressed in *Lang v. Wilbraham*, (2 Duer, 171,) "the title upon which the plaintiff seeks to recover."

If the *estate expire*, that is, cease or come to an end, there is reason for saying that as to the premises claimed, the defendant should go thereof without day, and the plaintiff recover his damages for the unlawful withholding up to the time the estate terminated. But if the estate continues to exist, though in other hands, (as by alienation, descent, devise or otherwise,) there is no good reason for saying that the defendant should go thereof without day; that is, be permanently discharged from liability therefor, by the verdict of a jury, and the judgment of the court; while the plaintiff, if he recovers them, recovers them as trustee in fact of him who since the commencement of the action has become the real party in interest.

This seems to me the sensible construction of this language, and it is confirmed by the very next section, (2 R. S. 308, § 32,) which provides that the action shall not abate by the death of the plaintiff, but the same proceedings shall be had as in other actions, to substitute the names of those who may succeed to the plaintiff's title. In such a case, (to wit, in case of death,) it is no less true than in the case of a voluntary alienation of the estate, that the title of the particular plaintiff has expired. Moreover, this construction harmonizes better with other statutory provisions, and with the general analogies of the law.

The condition of the law prior to the Revised Statutes seems to have been in accordance with the rule now claimed by the plaintiff. In *Jackson v. Leggett*, (7 Wend. 377,) the head note is: "A conveyance by a lessor in ejectment, after suit brought, to third persons in trust, is no bar to a recov-

ery." And in the opinion of the court, (*Id.* 380,) it is said : "The conveyance by Dubois, after suit brought, does not prevent a recovery in his name. In *Frier v. Jackson*, (8 *John.* 507,) it was held that where all the lessors died pending the suit, the suit did not abate, but might be prosecuted for damages and costs."

In the head note to *Wilkes v. Lion*, (2 *Cowen*, 334,) reference is made to the collection of authorities cited in the case, (*at pages* 355, 356,) to show that if the interest of the plaintiff's lessor expire after the commencement of the suit, and before judgment, he shall have judgment and execution for his damages, but not for the land.

In *Jackson v. Davenport*, (18 *John.* 302,) the court say, in their opinion : "This suit was brought before the termination of the life estate, and it appears by the plaintiff's own showing, not only that his estate is ended, but that the defendant has the reversionary interest. The plaintiff, then, has no title to turn the defendants out of possession ; but he has a title to the *mesne* profits, and the costs of this suit, and must, therefore, have judgment to enable him to recover them."

It would appear from the notes of the revisers that the sections (31 and 32) heretofore discussed, incorporated by them into the Revised Statutes, were not supposed to introduce a new rule, but to be substantially declaratory of the existing law. (5 *N. Y. Stat at Large*, 441.)

Let us now turn to the provisions of the Code. Section 121 of the Code declares that no action shall abate by the death, marriage or other disability of a party, or by the transfer of any interest therein, if the *cause of action survive* or continue. In case of transfer of interest otherwise than by death, marriage or other disability, the action shall be *continued* in the name of the original party, or the court may allow the substitution of the party to whom the transfer is made. The provisions of this section in the case of the death

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of parties, and probably in other cases, have been frequently applied to actions of ejectment. (*St. John v. Croel*, 10 *How.* 253. *Waldorph v. Bortle*, 4 *id.* 358. *Ash v. Cook*, 3 *Abb.* 389. *Putnam v. Van Buren*, 7 *How. Pr.* 31.) And in various actions where an assignment of the cause of action has been made *pendente lite*, the same rule has been applied. (*Howard v. Taylor*, 11 *How. Pr.* 380. *McGown v. Leavenworth*, 2 *E. D. Smith*, 24. *Murray v. Gen. Mu. Ins. Co.* 2 *Duer*, 607. *Harris v. Bennett*, 6 *How.* 220. *Sheldon v. Havens*, 7 *id.* 268.) As the Court of Appeals decided, in *McKee v. Judd*, (2 *Kern.* 622,) that all demands for injuries to property are assignable, and the Supreme Court decided, in *Foy v. Troy and Boston R. R. Co.* (24 *Barb.* 382,) that when so assigned, the action is properly brought in the name of the assignee, can it be doubted that under section 121, if a motion had been made in the present case, after the deed to Kidd and Cagger, to substitute them as plaintiffs, the court would have been empowered to grant such a motion.

The only adjudicated case relied upon to support the construction of section 31 of the Revised Statutes, claimed by the defendant, is that of *Lang v. Wilbraham*, (2 *Duer*, 171.) If this were a direct adjudication in favor of the construction contended for, I should be prepared to overrule or disregard it; but it is far from being so. That was an action of ejectment, brought by an heir at law of a testator, against a party in possession, the testator having devised his real estate (the premises in question, with others) to executors in trust, until the youngest son became of age, and also vested them with a *power to sell*, and directed a distribution of the proceeds of the sale among his children. The executors had leased for a term exceeding the duration of their trust estate, and disregarding such lease, one of the sons (apparently the youngest) had brought ejectment. The court held the suit well brought, but after its commencement the surviving executor exercised the power to sell, and sold the property to a third person. The court held that under section 31, of the Revised Statutes,

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before quoted, the title of the plaintiff had expired, and that the provisions of that section took effect ; doubtless upon the theory that the lawful exercise, by the executor, of the power of sale conferred by the testator, terminated the interest of the plaintiff in the real estate as such, and was the exercise of a paramount power, derived not from the plaintiff, but from a higher source ; that the plaintiff could not, after the exercise of such a power, by the executor, have effectually alienated the power himself, and must content himself with participating in the proceeds of the sale. Under the doctrine of equitable conversion, his real estate was turned into personal property. (*See Lang v. Ropke*, 5 Sandf. 363, for a fuller statement of the provisions of the Lang will.)

It was in view of *such* a case that the Superior Court employed the language, liable (if the facts were not borne in mind) to some misconstruction. "It (§ 31) applies to all cases where the title *upon which a plaintiff seeks to recover* the possession of real property, has from any cause *ceased to exist*, before the trial. It would be a narrow construction to confine it to cases in which the title expires *by its own limitation*."

I am for affirming the judgment of the court below.

MILLER, J. concurred.

INGALLS, J. expressed no opinion.

Judgment affirmed.

[ALBANY GENERAL TERM, September 17, 1865. *Miller, Ingalls and Hogeboom*, Justices.]

**KELLY vs. ARCHER and others.**

The affidavit upon which an application to a justice of the peace for an attachment is founded must specify the sum in which the debtor is indebted, "over and above all discounts," as required by the statute.

Where the application is made upon the ground that the defendant has departed from the county where he last resided, with *intent to defraud his creditors*, the affidavit must state that intent. It is not enough to state therein that the defendant left with the intent not to return, or secretly and without the knowledge of his family.

The statute requires that a bond shall be executed and delivered to the justice before an attachment is issued; and until this is done, no attachment can properly issue.

No other agreement will supply the place of the bond required by the statute; and if there is no bond, the justice will not acquire jurisdiction.

If the condition be not such as the statute requires, the bond will be void. No other condition will answer; and that being a jurisdictional and substantial defect, it cannot be obviated.

An undertaking by the plaintiff, not executed to the defendant, to the effect that if the defendant shall recover judgment, the plaintiff will pay all costs which may be awarded, and all damages which the defendant may sustain by reason of the attachment, is not a compliance with the statute.

The allegation that the defendant has departed from the county, with an intent to defraud his creditors, is an essential part of the case; and if it is not sustained by proof, the judgment will be void.

In an action for the unlawful taking and conversion of personal property, the plaintiff is entitled to recover the value of the property taken; and the fact that the defendants were creditors of the plaintiff and took the property under a void attachment, will not mitigate the injury, nor reduce the damages.

**T**HIS action was brought to recover damages for the wrongful taking and conversion of certain personal property belonging to the plaintiff. The defendants justified the taking under an execution issued upon a judgment obtained in favor of the defendants against the plaintiff upon an attachment issued against him in a justice's court. The plaintiff claimed that the attachment proceedings were void. The application for the attachment was made upon the ground that the defendant therein had departed from the county where he last resided, with an intent to defraud his creditors. The affidavit stated that the defendant was indebted to the plaintiff on a demand arising on contract, for two hundred

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dollars and upwards. It also contained the following clause, to establish the intent to defraud: "That he is informed and believes said Kelly left this county with *the intent not to return*, and has left but a small amount of property or goods, and departed *secretly and unknown to his family*; that his place of business is locked up; that there are now several attachments against him." The bond was not in the usual form of bonds executed in such cases, but after reciting that the plaintiff had applied "to one of the judges of this court for a warrant of attachment against the property of the defendant as an absconding debtor," provided that the sureties do undertake, pursuant to the statute in such case made and provided, in the sum of two hundred and fifty dollars, that if the said defendant recover judgment in this action, the above named plaintiffs will pay all costs that may be awarded to the above named defendant, and all damages which the said defendant may sustain by reason of the said attachment, not exceeding the sum above mentioned." The bond was not approved by the justice. There were several prior attachments, by virtue of executions on which and on the one in favor of the defendants, the constable sold the property. The defendants directed the constable to levy, and the defendants purchased \$364.35 in value, of the property, on the sale, and paid the constable \$164.35, retaining about \$200, the amount of their debt. The case was referred, and the referee found in favor of the plaintiff, for the amount retained by the defendants. Judgment was entered, on the report, and the defendants appealed. The points raised appear in the opinion.

*D. McMahon*, for the appellant.

*S. L. Stebbins*, for the respondent.

MILLER, J. The evidence upon the trial of this cause established that the property of the plaintiff was levied upon by the officer by virtue of an attachment issued in favor of

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the defendants and at their request. Other attachments had previously been issued, judgments obtained, executions levied, and property advertised for sale ; but the officer having proceeded to sell sufficient to satisfy the defendants' execution, after payment of those which had priority, under a levy made by their (the defendants') direction, and they having received the money realized upon the sale, I think the proof was sufficient to make the defendants liable if the sale was illegal and unauthorized.

Whether the sale was lawful or unlawful must depend upon the question whether the proceedings were sufficiently regular to confer jurisdiction upon the justice who issued the attachment. There are several objections to the proceedings, which I think render them void, and are fatal to their validity.

1st. The affidavit upon which they were founded did not specify any indebtedness "over and above all discounts" as required by the statute. (2 R. S. 230, § 28.) This is an essential part of the affidavit, and as it was, there may have been an offset to the demand, and the balance may have been the other way.

2d. The affidavit was also defective in not stating that the defendant had left the county with an intent to defraud his creditors. Although the application was made upon that ground, the affidavit is entirely silent as to this material and important fact. (*Miller v. Brinkerhoof*, 4 Denio, 118.) It is not enough that he left with the intent not to return, or secretly and without the knowledge of his family.

3d. No bond was executed in conformity with the provisions of the statute. (2 R. S. 230, § 29.) The instrument signed was not executed to the defendant. It was an undertaking to the effect that if the defendant recovered judgment, the plaintiff would pay all costs which might be awarded, and all damages which the defendants might sustain by reason of the attachment. It not only failed to embrace the language of the statute, but it omitted a material and necessary por-

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tion of the condition required by it. This did not comply with the statute, and was not enough. The statute required that a bond should be executed and delivered to the justice before the attachment was issued ; and until this was done, no attachment could issue. No other agreement will supply its place ; and as there was no bond, the justice did not acquire jurisdiction, and the plaintiffs were trespassers. (*Homan v. Brinkerhoff*, 1 *Denio*, 184.) The bond will be void if the condition be not such as the statute requires. (*Barnard v. Viele*, 21 *Wend.* 58.) No other condition than that required by statute will answer ; and as it is a jurisdictional and substantial defect, it cannot be obviated.

Some other objections might be urged ; but those already stated satisfactorily and conclusively establish that the proceedings were void and of no effect. These defects, so apparent upon the face of the proceedings, are not, I think, of a character to be disregarded. They affect the jurisdiction of the justice ; and as they show an entire want of jurisdiction, they cannot be overlooked.

It is insisted by the counsel for the defendants that the proceedings under the attachment cannot be attacked collaterally, by the judgment debtor himself. When certain facts are required to be proved, to warrant the issuing of process in a court of special or limited jurisdiction, if there be a total defect of evidence as to any essential fact, the process will be declared void, in whatever form the question may arise. But when the proof has a legal tendency to make out a proper case in all its parts, for issuing the process, then although the proof may be slight and inconclusive, the process will be valid until set aside by a direct proceeding for that purpose. (*Miller v. Brinkerhoff*, 4 *Denio*, 118.) The main difficulty with the affidavit here is that it did not establish the allegation that the defendant in the attachment suit had departed the county with an intent to defraud his creditors. This was an essential part of the case, and was not sustained by any proof whatever. There was a total defect of evidence, in this par-

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ticular ; and for this and other defects already stated, the judgment was void.

In *Skinnion v. Kelley*, (18 N. Y. Rep. 355,) to which we have been referred, the affidavit, upon which the attachment was allowed, proved some positive facts and circumstances which, although far from conclusive, tended to show an intent to defraud. These were not stated on information and belief, as in the case at bar, and the court held, as they no doubt created a conviction in the minds of the creditor and the justice that the debtor intended to defraud, that they could not say that they were so completely without force, as proof, as to render the proceeding utterly void.

In *Kissock v. Grant*, (34 Barb. 144,) the affidavit upon which the attachment was issued contained some positive facts which tended to show that the defendant had departed from the county where he last resided, with an intent to defraud his creditors, and which were sufficient to give the justice jurisdiction. Neither of these cases are entirely destitute of the ingredients required to establish a case within the statute.

I think that no error was committed by the referee in allowing the value of the property taken, as the amount of damages which the plaintiff had sustained. The action was for the unlawful taking and conversion of the plaintiff's property, and the fact that the defendants were creditors of the plaintiff did not mitigate the injury. They had no authority to pay their indebtedness by the commission of a wrong ; and if nominal damages, only, were recoverable, then every creditor would be justified in paying his debt by taking the law into his own hands. The act of the defendants being unlawful, it cannot be regarded in the nature of a mere involuntary trespass. The present case is not like an action on the case for damages arising from an irregular sale in proceedings for distress for rent where only nominal damages are recoverable. (*Butts v. Edwards*, 2 Denio, 164.) Nor is it similar to a case where the property has been appraised

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according to law to satisfy a debt due from the owner. (*Earl v. Spooner*, 3 *Denio*, 246.) The defendants here were trespassers from the beginning, in acting under a void process, and the application of the money realized upon the sale was illegal and unauthorized.

These views necessarily lead to the conclusion that no error was committed by the referee on the trial, and therefore the judgment entered upon his report must be affirmed, with costs.

HOGEBROOM, J. concurred.

INGALLS, J. expressed no opinion.

Judgment affirmed.

[ALBANY GENERAL TERM, September 17, 1886. *Miller, Ingalls and Hogeboom*, Justices.]

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 BENNETT vs. COUCHMAN.

Where an ejectment suit was brought by the assignee of the lessor, against the assignee of the lessee, for the nonpayment of rent on a lease containing a covenant for re-entry, and a judgment was rendered therein in favor of the plaintiff, for the recovery of the possession of the premises; *Held* that such judgment was a bar to a recovery in an action brought by a party claiming through the purchaser at a foreclosure sale under a mortgage executed by the assignee of the lessee, subsequent to the date of the lease, but prior to the commencement of the ejectment suit; the judgment of foreclosure being entered after the ejectment suit was instituted, but previous to its termination.

*Held, also*, that the lessee was a privy to the lessor, and the defendant in the ejectment suit, (the assignee of the lessor,) was also a privy. That the grantee in the mortgage executed by such defendant took subject to the rights of the lessor; and that the sale of the premises under the foreclosure proceedings did not in any way affect or impair those rights, or give the plaintiff any title, as against the defendant.

*Held, further*, that the title which the plaintiff claimed, through and under the defendant in the ejectment suit, being perfected by the foreclosure proceed-

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ings after the ejectment suit was commenced, the judgment in the latter suit, in connection with the title which the evidence established, under the lease, was conclusive against the plaintiff.

Irregularity in form does not render a judgment void. The irregularity can only be taken advantage of by the party on motion.

There is no objection to an admission by the defendant, in writing, of the facts alleged in the complaint, in order to save the necessity of proving those facts. And a judgment entered upon such written admission may be considered as a judgment entered by default, the answer having been withdrawn.

**THIS** action was originally commenced in a justice's court, for trespass, for wrongfully entering upon lands of the plaintiff, in the town of Conesville, in the county of Schoharie, and wrongfully taking and carrying away a quantity of hay. The answer set up title to the premises in William A. Bay, John W. Bay and William Bay, and claimed that the defendant entered under the direction and license of John W. Bay, William A. Bay and William Bay, or their agent. And the defendant having filed with the justice the requisite undertaking, the justice dismissed said action, on the ground that the title to land was in question by the pleadings, and the action was thereupon transferred to the Supreme Court.

The action came on to be tried at the circuit, held in the county of Schoharie, on the 18th day of April, 1864, before the Hon. CHARLES R. INGALLS, Judge, without a jury. On the trial, the plaintiff, to maintain the action on his part, gave the following evidence, viz : a deed from Allen Russell and wife to Peter R. Hallenbeck, dated the 6th of April, 1850, conveying the premises in question. Also a judgment roll in a foreclosure action between Ira Thorp, plaintiff, and Peter R. Hallenbeck and Catherine, his wife, defendants, which roll was filed 27th of September, 1862. That action was instituted to foreclose a mortgage, executed by Peter R. Hallenbeck and wife, to Ira Thorp, embracing the same premises. The premises were sold under the judgment, and a deed was executed by Norman W. Falk, the referee, to Josephine Thorp, on the 18th of April, 1862, subject to a mortgage on the premises to William Alger, upon which there was due one

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thousand dollars and interest thereon from April 6th, 1861, and subject to the original lease of said premises from Samuel Stringer, and to the covenants, reservations and conditions therein, so far as the said premises or the grantee in said deed might be subject by reason of that conveyance.

Josephine Thorp was put into possession of the premises. She executed a full covenant deed of the same to Sally Alger, dated July 5th, 1862, recorded July 16th, 1862, in the clerk's office of Schoharie county. The plaintiff also put in evidence a deed of the same premises from Sally Alger to Hiram Bennett, (the plaintiff,) dated March 28, 1863. It was admitted that Hallenback went into possession of the premises under the deed of Russell, and remained until dispossessed by a writ of assistance.

Hiram Bennett was sworn as a witness for the plaintiff, and testified : " I am plaintiff ; I took possession of the premises from Alger, and continued in possession till the defendant came there, 7th September, 1863 ; on that day the defendant came there and went to mowing ; I ordered him off ; I went up into the field to go to mowing and found him there with a lot of hands, and ordered the defendant out, and his hands off, but they refused to go, and continued mowing, and cut about ten tons of hay, and drew off most of it ; they drew off as much as three tons, and put the residue in the barn on the premises. The last time I was at the barn the hay had nearly disappeared ; the defendant locked up the barn and claimed the hay to the exclusion of my right ; the grass as it stood upon the meadow was worth from eight to ten dollars per ton ; the hay after it was cut was worth from twelve to fourteen dollars per ton in September, 1863, and is now worth fourteen dollars per ton ; I cut hay on the premises at the same time ; I had oats and peas in the barn at the same time, and had other personal property on the premises ; I kept the house locked ; I did not and do not live upon the premises."

George Wilsey was sworn as a witness for the plaintiff, and

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testified : " I went into the lot in question with the defendant. The plaintiff and his hands cut about eight or ten tons of hay, and put it in the barn ; it would have been good hay if cut in season ; as it was, it was worth five dollars per ton." It was agreed between the parties, upon the trial, that the hay cut and carried away was eight tons, and worth seven dollars per ton, and that it was worth one third of the crop to cut and cure it. The plaintiff rested.

The defendant put in evidence a judgment roll in an action between William Bay and others, plaintiffs, against Peter R. Hallenbeck, defendant, of which the following is a copy.

[Title of the cause.] " Whereas this action having been brought against me, the above named defendant, Peter R. Hallenbeck, in the Supreme Court, about the 10th day of March, 1859, by summons and complaint, by the above named plaintiffs, which action was ejectment, for the recovery of a certain piece of land situate in Conesville, Schoharie county, and being known and described as lot No. 14, in Stringer's tract, as described and referred to more particularly in the said complaint, containing one hundred acres of land, and the said action being to recover said land as forfeited by the non-payment of the annual rents as reserved in the following lease, viz : That in the year 1799, Samuel Stringer, now deceased, leased and granted in fee said land to one John Blair, his heirs and assigns, on condition, as follows : That the said grantee, his heirs and assigns, should yearly, and every year thereafter, yield and pay, or cause to be paid, unto said Stringer, his heirs, executors, administrators and assigns, fifteen dollars on the first day of January, in each year thereafter ; and it was also provided in said lease that if said rent should not be paid as aforesaid, by said grantee, or his heirs or assigns, as aforesaid, to said grantor, or his heirs or assigns, that the said grantor, or his heirs or assigns, should have the right to distrain, &c. ; and it was also provided that if default should be made by the *non-payment* of said rent, or any part thereof, then it should be lawful for said grantor, or his heirs or assigns,

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to re-enter said land in the name of the whole, or any part thereof, to repossess and enjoy and have again as his former estate. *Now, whereas* many actions have been lately decided in the Court of Appeals, of this state, at the June term thereof in favor of the plaintiffs, and adverse to the defendants, on leases similar to the one upon which this action is brought, and the Supreme Court having repeatedly, as well as the Court of Appeals, decided adverse to the tenants, I, Peter R. Hallenbeck, the said defendant, do therefore, to save costs, hereby withdraw my answer to said complaint in said action, and consent that the said plaintiff take judgment for the relief demanded in said complaint. I, said defendant, do hereby admit that the said lease of land, from Samuel Stringer, to said John Blair, was duly executed, sealed and delivered to the said grantee on the 21st day of October, 1799, the day it bears date. Also admit that on the 6th of April, 1850, I became the assignee of said lease, and owner of all the estate and interest of said grantee to said premises aforesaid. I, said Peter R. Hallenbeck, also admit that the plaintiffs became seized of all the estate and interest in and to the rents reserved in said lease by Samuel Stringer, as owners, and all the estate of said grantor before the 19th day of March, 1850. I, defendant, also admit that notice was duly served upon me, requiring payment of the arrears of rent due on said premises, and that unless the arrears of rent was paid within fifteen days the plaintiffs would re-enter, which notice was served on me by plaintiff in writing more than fifteen days before the commencement of this action, according to the act passed 13th May, 1846. I also admit that I, as owner and assignee of the grantee of said lease, occupied said premises from 1850 to 1859, and since that time.

I also admit that nine years rent was due and unpaid to the plaintiffs at the commencement of this action, and I do hereby consent that the plaintiffs, or their attorneys, enter judgment against me for the recovery of the aforesaid premises, and damages for withholding same, to the amount of

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\$100 and costs, as claimed in the complaint, at any special term of the Supreme Court, or circuit, to be held in the county of Albany or Schoharie.

(Signed,)

PETER R. HALLENBECK.

Dated July 18, 1863."

The roll was filed and judgment entered on the 3d day of August, 1863, in the clerk's office of Schoharie county. It was admitted by the plaintiffs' counsel that the premises described in the complaint in this action are the same which are described in the complaint contained in said judgment roll. The plaintiff's counsel objected to the introduction of said judgment roll upon the grounds :

1st. That the roll contained no summons or proof of service thereof upon the defendant therein.

2d. The judgment does not appear to have been rendered upon a verdict, nor upon an offer made pursuant to the Code.

3d. The roll shows that an answer was served for the defendant Hallenbeck, by W. H. McClellan, of Albany.

4th. It appears that the mortgage under which the foreclosure was made, was anterior to the commencement of the ejectment suit, and hence the admission or confession of Hallenbeck, contained in the judgment roll, is unavailing as against the plaintiff claiming under the mortgage. The questions were reserved.

The defendants gave in evidence the summons in the ejectment suit, with proof of service thereof upon the defendant Hallenbeck, 19th March, 1859. The plaintiff's counsel objected to its admission as evidence, which objection was overruled, and the plaintiff excepted.

The defendant then offered in evidence a lease from Samuel Stringer to John Blair, dated 21st October, 1799, of lot No. 14 of the premises in question. This was objected to by the plaintiff's counsel as immaterial, and showing no right in the defendant under this judgment. The lease was received as evidence, subject to the objection.

Allen Case was then sworn as a witness for the defendant,

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and testified : " I was deputy of the sheriff of Schoharie county in 1863 ; I have and here produce an execution which was received by the sheriff, September 3d, 1863 ; under which process, possession of the premises was delivered to the defendant September 3d, 1862 ; the costs and damages \$210.63, as to which the execution was returned *nulla bona* ; I put out Bennett from the premises and put the defendant in possession on the 3d of September, 1863." *Cross-examined.*—When I executed the process, I went upon the premises and drove off the stock that was thereon ; I did not move any hay that day, but a few days after I moved the hay, except that which was in the wagon house, to the highway ; Hal-lenbeck showed me the bounds of the farm ; I did not go into the house ; it was locked, and I do not know who had the key ; I did not inform Mr. Bennett that I had such writ when I went there the first time ; Peter Bennett was mowing ; Mr. Couchman was mowing on the 7th day of September, 1863."

L. Falk was sworn as a witness for the defendant, and testified : " I was the agent and attorney for the plaintiff in the ejectment suit ; the sheriff delivered up possession of the premises on the 3d September, 1863, to me as the agent and attorney of the plaintiff in the execution, and on the 7th of September, 1863, the defendant Couchman went on the premises and cut the hay under my directions, as the agent and attorney of the plaintiffs Bays." *Cross-examined.*—" When the sheriff gave me possession he called us up on the 3d of September, 1863, and said, ' I now surrender up to you possession of the premises described in the judgment and writ of possession.' "

The plaintiff put in evidence the mortgage from Peter Hal-lenbeck and wife to Ira Thorp, dated the 1st of April, 1859, recorded 26th May, 1858 ; principal \$428, payable one year from date.

The plaintiff put in evidence an order of confirmation of sale, directing a conveyance dated 27th May, 1863. Also an

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order confirming sale of referee, entered at special term, in Schoharie county, September 1st, 1863.

The defendant's counsel objected to the judgment, &c. in foreclosure, on the grounds :

1st. That the record failed to show that public notice of sale had been given. 2d. That there was no affidavit of sale. 3d. That the roll failed to show the proceedings regular and valid. The testimony here closed, and the judge thereupon made his decision in writing, whereby he found and decided that the plaintiff was not entitled to recover any thing against the defendant, and that the complaint be dismissed with costs.

Judgment being entered accordingly, the plaintiff appealed.

*L. Tremain*, for the appellant.

*H. Smith*, for the respondent.

*By the Court*, MILLER, J. The main point which it is necessary to consider in this case is whether the judgment in the ejectment suit brought by the Bays against Hallenbeck was operative against Bennett, and precluded him from contesting the defendant's rights acquired by virtue of that judgment. It is claimed by the defendant that it was a bar to a recovery in this action, and that the foreclosure proceedings and judgment under which the plaintiff claimed, did not give the plaintiff any title, as against the defendant.

The mortgage, which was foreclosed, bore date some time prior to the commencement of the ejectment suit, but the judgment of foreclosure was entered after the ejectment suit was instituted, and previous to its termination. The ejectment suit was founded upon the non-payment of rent under a lease with a covenant authorizing a re-entry, which lease was executed long prior to the making of the mortgage. Under this lease, the defendant in the ejectment suit held the premises, and the mortgage was executed by him.

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There was no special finding of facts and conclusions of law by the judge, in the present case, and no exception to any failure of the defendant to introduce evidence showing title in the plaintiffs in the ejectment suit and a default in the payment of rent, which authorized a re-entry independent of the judgment. As the judgment itself contained some evidence on the subject, and was not specifically objected to, on account of it not being of the highest character; and as the lease was introduced independent of the judgment; and inasmuch as the defects in these particulars were of a character which could be supplied; I think it must be assumed that the defendant made out title in the parties under whom he claimed to act, and for this reason we must consider the naked question whether the judgment in the ejectment suit, in connection with the facts proved, was a bar to the plaintiff's right to recover in this action.

I am inclined to think that under the state of facts presented, the plaintiff was not in a position to override the rights acquired by the defendant, by virtue of the judgment in the ejectment suit. The rule is well settled that a verdict or judgment in a former action upon the same matter directly in question, is evidence for or against privies in blood. (*Coan v. Osgood*, 15 Barb. 583. *White v. Evans*, 47 id. 179, and authorities there cited.)

The question then arises, in the case under consideration, whether the plaintiff in this action was a privy in the ejectment suit. The lesser "privity" denotes mutual or successive relationship to the same rights of property. And privies are distributed into several classes, according to the manner of this relationship. They are most generally classed into privies in estate, privies in law, and privies in blood. Privies in estate consist of *donor and donee, lessor and lessee*, and joint tenants. (1 *Greenl. Ev.* § 189.) In *Coan v. Osgood*, (15 Barb. 588,) Welles, P. J. after quoting from the above section in *Greenleaf's Evidence*, says: "In the instances

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given by our author, of privies in estate, as indeed in other classes also, they are *between persons where one succeeds to the rights of another*; or, as is sometimes expressed, *in the post*, to another; except in the case of joint tenants, where each represents the interest of all; like coparceners, where all make but one heir." The learned judge quotes from *Burrill's Law Dictionary*, in which privity is defined as "a derivative kind of interest, founded upon, or growing out of, the contract of another, as that which subsists between an heir and his ancestor; between an executor and testator, and between a *lessor or lessee and his assignee*. The same author also defines "privity" to be "a person who has an interest in an estate created by another; a person having an interest derived from a contract or conveyance to which he is not himself a party. Thus an heir is privy to the conveyance of his ancestor, an executor to the contract of his testator, and an assignee of a lessor, to the contract of the original parties."

Under these general rules the lessee was a privy to the lessor. Hallenbeck, the defendant in the ejectment suit, the assignee of the lessor, was also a privy. The mortgage was also executed by Hallenbeck, and the mortgagee took subject to the rights of the lessor, and the sale of the premises was made under the foreclosure proceeding without in any way impairing or affecting those rights.

The plaintiff in this action held through and under the title of the plaintiffs in the ejectment suit. The interest which he obtained by the conveyance to him grew out of the contract of the lessor with the lessee, to which he was not a party, and the conveyance of the lessee's interest to the assignee, and he actually stood in the position of the assignee. The assignee would have been a privy beyond any question, and because the plaintiff held by purchase at a foreclosure sale the assignee's interest in the premises, it did not alter his position, or confer upon him any additional or stronger right or title. He thereby acquired no other or different or better right than that which the assignee assigned. He

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in point of fact stood in his place, as his legal representative, by means of the foreclosure proceedings, which invested him with the legal title of his predecessor, and nothing more. He was, I think, a privy in estate, who succeeded to the rights of another—the mortgagor—by virtue of the sale, and as such had an interest founded upon and growing out of the original contract between the lessor and the lessee, or his assignee, which was affected by the judgment in the ejectment suit, the same as if he had been an original party to the same. The plaintiff in this action claimed through and under the party against whom the judgment in the ejectment suit was obtained. This title was perfected by the foreclosure proceedings after the ejectment suit was commenced, and hence I think the judgment, in connection with the title which the evidence established, under the lease, was conclusive against the plaintiff. (*Laws of 1862, p. 977.*)

We have been referred to several cases as authority to sustain the position urged by the plaintiff's counsel, but, after a careful examination, I am satisfied that none of them are adverse to the views which I have already expressed. In *Campbell v. Hall*, (16 *N. Y. Rep.* 575,) it was held that a mortgagee of land is not estopped by a judgment, in the action, or the award of arbitrators, between his mortgagor and a prior mortgagee, rendered after the execution of the second mortgage, but may litigate the amount due upon the prior mortgage, notwithstanding such judgment or award. In the case cited, which was an action to foreclose a mortgage, the holder of the second mortgage was not a party to the former suit, and occupying the relation simply as a junior incumbrancer, there was no such privity with him as could cut off his rights, without notice. It was entirely different from the case of a lessor and lessee, or the assignee of a lessee, to the contract between the original parties, and not within the rule laid down in the authorities to which I have adverted.

In *White v. Evans*, (47 *Barb.* 179,) distinct objections were taken to the findings of fact in regard to the plaintiff's

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title; and I understand the decision was put upon the ground that many of the most material facts to show the defendant's title were not proved. This is an essential and vital difference which distinguishes the two cases, and renders the case cited no authority for the position taken by the counsel for the plaintiff.

In *Tanner v. Smith*, a manuscript decision in the third judicial district, it appeared that the suit the record of which was introduced in evidence, was commenced long after the suit on trial, and after the defendant in the latter *had left the premises*. The defendant was not a party in that suit, and it was commenced and tried after his rights had accrued, and he therefore never took or held subject to that judgment. It will be perceived that the case differs materially from one where the rights of the party who has been prosecuted have been transferred by assignment, or the due course of a legal sale.

The objections made to the entry of the judgment are not, I think, well founded. Although the form of the judgment is somewhat peculiar, yet I think it may be considered as a judgment entered by default, the answer having been withdrawn. Nor do I see any objection to an admission by the defendant, in writing, of the facts alleged in the complaint, that saving the necessity of proving those facts. The most that can be urged against the judgment is that it was irregular. This could only be taken advantage of by the party on motion. Clearly it was not void.

As no error exists in the proceedings had upon the trial, a new trial must be denied, and the judgment affirmed, with costs.

[ALBANY GENERAL TERM, September 17, 1866. *Miller, Ingalls and Hogeboom, Justices.*]

TUCKER *vs.* MALLOY.

When an officer becomes satisfied that there was a want of jurisdiction in the court issuing the process, he is not bound to act under it, and if sued for a neglect of duty, he may set up the invalidity of the process as a defense, even though he has already collected a portion of the amount specified therein, and made a return thereof.

He has a right, under such circumstances, to suspend action at any time, and his return of a partial collection of the execution does not create an estoppel.

**A** PPEAL from a judgment entered upon the report of a referee.

The action was brought for the neglect and refusal of the defendant as a constable of the town of Rondout, in the county of Ulster, to levy an attachment and execution issued by a justice of the peace of the said county, in favor of the plaintiff, upon the property of one James Kelly, whereby the plaintiff's debt against said Kelly was lost.

The defendant, by his answer, admitted that James Kelly was a resident of the county of Ulster ; that Josiah Dubois, Jr. was a justice of the peace, and that the defendant was a constable, as alleged in said complaint ; and further, that at the times stated in the complaint, he received from said justice a paper purporting to be an attachment, and a paper purporting to be an execution, but denied that the tenor and effect, command and direction thereof were as alleged in said complaint. And he alleged, that as to those portions of said complaint alleging the application for an attachment, and the proceedings and judgment before said justice, he denied any knowledge or information thereof sufficient to form a belief, except that he was and is informed and believes that there was no proof of the facts and circumstances, no security given on said application, as required by the statute, and that said justice acquired no jurisdiction of the subject matter of said attachment suit, or of the person of James Kelly, the defendant therein, and that the said proceedings, judgment, and pretended attachment and execution are and were wholly unauthorized and void. And as to the allegations or parts of

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allegations of said complaint, to the effect that the said James Kelly had absconded from the county of Ulster, and was indebted to the plaintiff in the sum of two hundred dollars (or any other sum,) and that the moneys mentioned in said pretended attachment or execution are wholly (or partly) unpaid and lost to the plaintiff, he denied any knowledge or information thereof sufficient to form a belief.

For the purpose of saving time, the defendant made the following admissions, instead of putting the plaintiff to the proof thereof, which admissions were to be of the same binding effect as though they were actually proven on the trial thereof:

*First.* The defendant admitted that he was a constable at the time alleged in the complaint.

*Second.* That J. Dubois, Jr. was, during the month of August, 1864, as mentioned in said complaint, a justice of the peace for the town of Kingston.

*Third.* That, on the 24th day of August, 1864, the plaintiff applied to said justice for an attachment against one James Kelly, on affidavit and undertaking; that on said day an attachment was granted, returnable on the 30th day of August, 1864, and that said attachment was delivered to the defendant to execute; that on the 30th day of August, 1864, the plaintiff recovered a judgment against said defendant, James Kelly, for \$204, on said attachment and proceedings, Kelly not appearing in the case, and that, on the 31st day of August, 1864, an execution was issued under said judgment and delivered to said defendant.

The plaintiff offered in evidence the affidavit of P. L. Tucker, the undertaking on the attachment, and the attachment, which were severally objected to and admitted.

The defendant then admitted that a judgment was taken against the said defendant, James Kelly, in his absence, he not appearing in the case, on the 30th day of August, 1864, for \$204, under the above proceedings, and also that an execution was issued on the 31st day of August, 1864, and

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returned October 3d, 1864, partially satisfied. The defendant also admitted the amount of the sales of Kelly's property by the defendant as constable, was \$555.77. That said property of Kelly was sold by the defendant as constable, under several executions, as follows : one in favor of M. J. Madden, for \$121.31 ; another in favor of Edward Kelly, for \$34 ; another in favor of Archer & Bro. for \$204 ; another in favor of Atkinson & Koon, for \$64.56 ; and that the said sale took place on the 22d of August, 1864, and also that an attachment in favor of Alva S. Staples, against said Kelly, was issued on the 19th August, 1864, and on the same day levied by the defendant as constable, on the same property, and judgment perfected on the 26th of August, 1864, for \$27.38. The defendant further admitted, that at the sale of said property under the executions aforesaid, said Archer & Brother were purchasers to the amount of \$364.35, and that on the 25th day of August, 1864, the defendant, Malloy, received from Archer & Brother the sum of \$164.35, the balance over and above the amount of their said judgment, on account of such purchases as aforesaid, it being part of the proceeds of said sale. The defendant also admitted, that on the 23d day of August, 1864, he paid to M. J. Madden the sum of \$55, as per receipt read in evidence.

The plaintiff then rested his case. Whereupon the defendant moved to have the plaintiff nonsuited on the following grounds :

*First.* The evidence fails to show any money in the hands of the defendant Malloy, belonging to said James Kelly, on the 24th of August, 1864.

*Second.* The evidence fails to show that the defendant has negligently or carelessly omitted to levy the attachment of the plaintiff.

*Third.* The evidence does not show that there was any property of the defendant Kelly subject to attachment, on which the defendant could levy under the attachment.

*Fourth.* It appears affirmatively, that the officer has paid

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out all the moneys in his hands accruing from the sale, before the receipt of the plaintiff's attachment.

*Fifth.* The attachment proceedings are irregular, unauthorized and void, and confer no jurisdiction to issue the attachment.

Whereupon the referee made his report in writing, by which he found the following facts :

*First.* That on the 24th day of August, 1864, the plaintiff obtained a paper purporting to be an attachment, returnable the 30th day of August, 1864, against one James Kelly, from Josiah Dubois, Jr. justice of the peace of the county of Ulster. And that such paper was issued in pursuance of an affidavit of the plaintiff, sworn to in the city of New York, by which affidavit it does not appear in what county James Kelly last resided, or then resided, and in which on information and belief the plaintiff alleges that the said Kelly has secretly departed this state for the purpose of cheating and defrauding his creditors, but no facts or circumstances are set forth sufficient to warrant the justice to act upon said affidavit. An undertaking was also used upon the application for an attachment which in its condition does not comply with the statute, which is without seal, and not approved in writing by the justice.

*Second.* That on the 30th day of August, 1864, judgment was docketed by the said justice against James Kelly in favor of this plaintiff, for the sum of \$204 on such alleged attachment, and a paper purporting to be an execution, issued by said justice on such judgment. That James Kelly did not appear on the return day of said attachment.

*Third.* That the defendant in this action took such attachment and execution and made return thereon of certain property found.

*Fourth.* That the property of James Kelly was sold under several executions on the 22d day of August, 1864, by the defendant in this action, as constable, and that there was realized on such sale the sum of \$555.77.

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*Fifth.* That on the 23d of August, 1864, the defendant paid over to one M. J. Madden, in trust for the wife of James Kelly, the sum of \$55, which was the surplus remaining after the sale aforesaid, and the payment of the several executions, and interest, costs and fees thereon.

*Sixth.* That the defendant received on the 25th day of August, 1864, \$164.35 from the firm of Archer & Brother, which firm had purchased at said sale \$366.35, and had been allowed by the defendant three days to send for property and pay the balance of the purchase money.

The referee's conclusions of law were: *First.* That the whole proceedings under and in pursuance of the affidavit of the plaintiff and the undertaking above mentioned, and the pretended attachment and judgment and execution were null and void.

*Second.* That there was no property of the said James Kelly in the possession or within the reach of the defendant at the time of the receipt of said void attachment and execution upon which he could levy.

*Third.* That the defendant was not guilty of any neglect or breach of duty as constable in the premises, and is not indebted to the plaintiff for any of the matters or things demanded in this action, and that the defendant was entitled to judgment, dismissing the complaint on its merits, with costs.

Judgment of dismissal being entered, the plaintiff appealed.

*D. McMahon*, for the appellant.

*S. L. Stebbins*, for the respondent.

MILLER, J. The affidavit upon which the attachment proceedings in favor of the plaintiff and against James Kelly were instituted utterly failed to establish that Kelly had left the county where he resided, with intent to defraud his creditors. The same objections exist to the proceedings as were

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urged in the case of *Kelly v. Archer, et al.* (*ante*, p. 68,) and which are fully discussed in the opinion in that case. Some others are presented which are equally apparent, but as sufficient appears to show that the attachment proceedings were void for want of jurisdiction in the officer who issued the attachment, it is not important to examine them.

The proceedings being void, the question arises, whether the defendant was bound to execute them and has made himself liable by reason of his failure to do so. In the case under consideration, the defendant made a return that he had collected a small amount before the execution issued upon the judgment, and that he could not find any other property. Having thus returned a partial collection of the execution and failed to realize the balance, is he entitled to protect himself from liability by proof of the invalidity of the process under which he acted?

I think that this fact does not prevent the interposition of a defense that the process was immaterial. By collecting a portion of the amount he did not thereby obligate himself to proceed and collect the remainder, of the defendant in the judgment. When an officer becomes satisfied that there is a want of jurisdiction, he is not bound to act, in any way. He may stop as soon as he becomes convinced of this, and if sued for a neglect of duty, may show in his defense such want of jurisdiction. (*Earl v. Camp*, 16 *Wend.* 562.) It may well have been the case that when he sold, and realized the amount which he returned as collected, he was not advised of the defective character of the process under which he was acting. But even if he was, I think that the right to suspend action existed at any time. The return to the execution did not injure any one, and no action was taken by the plaintiff in the execution in consequence of it. It was not such an act as created an estoppel. (*Dexell v. Odell*, 3 *Hill*, 215. *Hawley v. Griswold*, 42 *Barb.* 18.) If the officer had brought a suit he would have been compelled to show a valid judgment, in order to sustain it. (16 *Wend.* 563.) The

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case now before us is different from one where there is a mere irregularity which does not render the judgment void, and which may be amended ; or a case where the officer has collected money under process which was not absolutely void, and which he has treated as valid. (*See Walden v. Dawson*, 15 Wend. 575.) In the case last cited, the officer received the money and returned the writ by virtue of his office. It was held, very properly, that under such circumstances he could not avail himself of a slight irregularity in the process itself which could be amended, and which therefore did not render it entirely nugatory.

It is said that the referee erred in holding that there was no property of the debtor in the possession of or within the reach of the defendant, at the time of the receipt of the attachment and execution, upon which he could levy.

The money which the defendant paid over was the surplus money arising upon a sale under the other attachments, and was paid prior to the attachment in favor of the plaintiff being issued. At that time it was apparent that the money belonged to the defendant in the attachment proceedings, and no one but he had any right to complain that the payment was illegal. Although this surplus money was paid over prior to the payment by the Archers for the property bid in by them, yet I think that it was properly applied. It could be ascertained by calculation, and the officer could see that the avails of the sale were enough to meet these executions, and as they were provided for by what remained unpaid, I think it makes no difference, because he chose to apply the money in advance of the payment. He had a right to regard the unpaid sum as applicable to the executions under which he had sold. But whether he acted lawfully or otherwise, at the time when the attachment of the plaintiff was received, the officer had paid over the surplus, and there was no money in his hands except what was liable to be appropriated to the payment of demands which were antecedent to the

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plaintiff's debt. Nor was any received afterwards which was not applicable to prior attachments.

I think there is also another answer to this allegation of error in the referee's decision. As the judgment and proceedings were void and the officer was not bound to act under them, as I have already shown, the finding of the referee upon this subject was in regard to a material fact which could not affect the result to which he finally arrived.

I have no doubt but that the proceedings under the attachment can be assailed in this action, by the defendant.

The judgment entered upon the referee's report must be affirmed, with costs.

HOGEBOM, J. concurred.

INGALLS, J. expressed no opinion.

Judgment affirmed.

[ALBANY GENERAL TERM, September 17, 1886. *Miller, Ingalls and Hogeboom, Justices.*]

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 ROSBORO vs. PECK.

Although the plaintiff's complaint, in an action to recover back money paid by mistake, alleges a demand, and a refusal to pay back the money, and the defendant's answer admits the refusal to pay, proof of a promise by the defendant, afterwards, does not present such a variance between the cause of action alleged and the evidence, as will preclude a recovery.

A release discharging a party from "all claims and demands on account of our late copartnership," &c. is not a bar to an action by the releasor, against the releasee, to recover back a sum of money alleged to have been paid by mistake, on a sale by the latter to the former, of his interest in a copartnership. Parol evidence of prior oral negotiations tending to establish the fact that an erroneous amount was inserted in a bill of sale and in a release is admissible, for the purpose of proving that the consideration for a sale of property was wrongly stated in the bill of sale, and release at \$4650, instead of \$4250. And this although the plaintiff has not, in his complaint, formally asked for a reformation of the contract.

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89h	385
48	92
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The pleadings can be amended, in such a case, so as to render the testimony entirely admissible. The court is authorized to amend the complaint to conform it to the proof, and all the facts having been elicited, they will be regarded as if the amendment had actually been made.

ON the 18th of April, 1863, the plaintiff and defendant were partners in conducting the Merchants' Hotel, in Albany, when, some difficulty occurring between them, the plaintiff, by a verbal agreement, purchased the defendant's interest therein for \$4000, paying him \$500 down. It was soon afterwards claimed by the defendant that there was a misunderstanding; that he was to have *all* the partnership bank account, \$900, or \$922, and the money in the house, in addition to the \$4000. The defendant had overdrawn his portion of the bank account, \$845, leaving \$422.50 due from him to the plaintiff. This was finally arranged by the plaintiff consenting to take \$200 for the \$422.50, so that, by the arrangement finally made, the plaintiff was to pay the defendant the \$4000, allow him half the bank account (\$922) at \$450, and the defendant was to deduct from this aggregate \$200 of the \$422.50 he owed the plaintiff for half the amount he had overdrawn the bank account. This last arrangement was actually made a day or two after the 18th of April. The defendant then gave the plaintiff a bill of sale of the property he was to transfer to him, and the plaintiff gave the defendant a release "*from all claims and demands on account of our late partnership.*" For some reason, probably to give the plaintiff the proceeds of the house, these papers were dated back to April 18, the day of the first agreement. By mistake in the figuring, the \$200 instead of being subtracted from, was added to the \$4450, making the amount to be paid \$4650, instead of \$4250. Through that mistake, the bill of sale stated the consideration at \$4650.

At the time of the delivery of the bill of sale and release, the plaintiff paid the defendant \$4650, after deducting the \$500 he had paid at the first negotiation. The plaintiff started to go down stairs, but, discovering the mistake, re-

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turned, made it known to the defendant, and requested him to deliver the paper on which the figuring was done, and rectify the mistake. He declined to give up the paper—did not deny the mistake, but promised to rectify it. The case was referred, and the referee reported in favor of the plaintiff for the amount claimed, and interest. The points made appear in the opinion. Judgment was entered on the report, and the defendant appealed to the general term.

*W. Wait*, for the appellant.

*H. Smith*, for the respondent.

*By the Court*, MILLER, J. The plaintiff in this action claimed to recover of the defendant upon the ground that he had by mistake paid the appellant the sum of four hundred dollars more than he had agreed to pay him.

Although the plaintiff's complaint alleges a demand and a refusal to pay back the money, and the defendant's answer admits the refusal to pay, yet, I think, that proof of a promise by the defendant, afterwards, did not present such a variance between the cause of action alleged and the evidence as precluded a recovery.

The proof of the promise was given without objection, and tended to establish the mistake upon which the action was founded, which was the main feature of the plaintiff's case. It was an admission of the party, that such mistake existed, and in that point of view was important evidence in making out the plaintiff's case. It did not change the cause of action, nor show any essential variance between the complaint and the evidence.

The release which was introduced in evidence upon the trial was not, I think, a bar to the plaintiff's right of action. The release discharges the defendant "from all claims and demands on account of our late partnership, upon the basis of the books as he has delivered them to me of said hotel, and

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in lieu of claims of any liability of said Peck to the copartnership." This clearly qualifies and restricts the release to the copartnership claims, and does not affect the claim of the defendant arising out of the mistake alleged. That was not a partnership, but an individual claim originating in a settlement made between the parties. But even if the release was effectual to bar the plaintiff's right of recovery under ordinary circumstances, it cannot, I think, be conclusive if the plaintiff has succeeded in establishing a mistake in the settlement of their copartnership affairs by legal and proper evidence.

It is claimed that such a case has not been made out; that the written bill of sale and the release are conclusive evidence of the contract of sale, and that the referee erred in admitting parol evidence of prior oral negotiations tending to establish the fact that an erroneous account was inserted in the bill of sale and in the release. The object of this evidence was to prove that the consideration was wrongly inserted at \$4650, instead of \$4250. I am inclined to think that this evidence was admissible, for the purpose for which it was offered. It is true, that the complaint did not ask to reform the instrument, in so many words; but it alleged that the account was erroneously added to the account which the plaintiff was to pay, and it was substantially within the object for which the action was brought, to prove the error which it was alleged existed. The proof showed a mistake in the insertion of a wrong amount, in the bill of sale and the release, and that was the real point in the case. Parol evidence is admissible to show a mistake in fact and to rectify it. (*Graves v. Harwood*, 9 Barb. 477. *Cook v. Eaton*, 16 id. 439.) It is also admissible to explain the consideration clause in a written agreement. (1 *Greenl. Ev.* § 285. *McCrea v. Purmort*, 16 Wend. 460. *Adams v. Hull*, 2 Denio, 306.) It cannot, however, affect the validity of, or alter or contradict, the legal and common sense construction of the instrument. (16 Wend. 473.) In the case at bar, the amount inserted is a mere recital that money has been paid, in the bill of sale

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and release, without any covenant or promise in regard to it, and I am not entirely satisfied that the evidence was not admissible to explain this statement, which is ordinarily open to explanation.

There can be no doubt, I think, that the evidence would have been entirely competent if the complaint had asked for a reformation of the contract. This was not formally done; but I am inclined to the opinion that this relief was consistent with the complaint and the case made out and embraced in the issue. (6 *Code*, § 275.) The principle is well settled that relief can be granted consistent with the facts stated, although not specifically demanded, without regard to the old distinction between law and equity. (*See Denman v. Prince*, 40 *Barb.* 213, and *authorities there cited. Butterworth v. O'Brien*, 24 *How. Pr.* 438, *Thomas v. Murray*, 32 *N. Y. Rep.* 611.)

If the plaintiff was entitled to relief declaring the contract reformed, and it was embraced within the issue, under the liberal rules laid down in the authorities cited, the testimony showing the error was properly admitted.

The pleadings could have been amended so as to render the testimony entirely admissible, (*Code*, § 173,) and the court was authorized to amend the complaint to conform it to the proof; and all the facts having been elicited, it will be regarded as if the amendment had actually been made. (*Bedford v. Terhune*, 27 *How. Pr.* 422, 444 and 450. *Thompson v. Kessel*, 30 *N. Y. Rep.* 383.)

I discover no error in the finding of the referee upon the question of fact submitted to him.

The judgment upon the referee's report must be affirmed, with costs.

[ALBANY GENERAL TERM, September 17, 1866. *Müller, Ingalls and Hogebloom, Justices.*]

STEDMAN and others *vs.* THE WESTERN TRANSPORTATION  
COMPANY.

By the contract between the owners of goods and common carriers, risks by fire, in the transportation of the goods, were expressly excepted. *Held* that by the terms of the contract, only ordinary risks were intended, and that the carriers were not excused from liability, in case of loss, if the loss was caused by the fault or negligence of the carriers, or their agents or employees.

*Held, also*, that the carriers were exempted from liability for a loss of the goods occurring by fire while in a railroad depot at an intermediate point, on the line of transportation; unless their negligence, as common carriers, in transporting the goods, contributed to produce the loss.

Where no particular time is named within which goods are to be forwarded, or that they shall be forwarded at once, without any delay, carriers are entitled to such time as will be reasonable in the ordinary course of the business in which they are engaged.

Goods received by the defendants, as common carriers, from the plaintiffs, at Boston, to be transported to the west, arrived at the railroad depot, at East Albany, on the 27th and 28th of June, 1861, and were stored in the warehouse of the railroad company, where they remained until the 5th day of July, when the warehouse and its contents were destroyed by fire. The defendants had no direct notice of the arrival of the goods, but they were left to be called for, in the usual course of business, which was for the defendants to send a boat for them once a week, or once every two weeks, or as often as there were enough to send a boat for. *Held*, that the delay in the transportation of the goods was not unreasonable, but in accordance with the usual course of business, and not beyond the ordinary time allowed for that purpose. And that there was no rule requiring the defendants to act *immediately*, and transport what goods were on hand without regard to the quantity, or the expense caused by thus deviating from their usual custom and practice.

Where, in an action against carriers, the plaintiff intends to claim that there is a disputed question of fact in regard to the defendant's negligence, he should make a distinct request that it be submitted to the jury.

THIS action was brought to recover \$516.84, as damages, for the loss of certain goods received by the defendant, as a common carrier, from the plaintiffs, at Boston, to be transported to the west, and which were destroyed by fire, at East Albany, on the 5th of July, 1861. The goods in question were delivered on the 26th day of June, 1861, at the depot of the Western railroad, in Boston, for which a receipt was given by the railroad company. This receipt, as was the usual

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practice, was carried to the regular agent of the defendants, in Boston, and exchanged for a through bill of lading from Boston to the different destinations at the west, for a gross sum of freight. The defendant was a common carrier by water to the west, but had no line of its own between Boston and Albany. The goods were received at the railroad depot at East Albany, partly on the 27th and partly on the 28th of June. The defendants did not remove them, and on the night of July 5th the depot and goods were entirely consumed. The bill of lading given by the defendants, at Boston, had a clause exempting them from the risks of fire, and in the contract with the railroad company damages by fire were excepted, and it was stipulated that such losses "should be borne by the owner." This, the plaintiffs insisted, only exempted from the ordinary damages of fire in the course of a proper and prompt transportation, and that the defendants were guilty of neglect.

The action was tried at the Albany circuit, before Justice INGALLS and a jury, on the 16th of November, 1865, and at the conclusion of the plaintiff's testimony the court dismissed the complaint. Judgment was entered in favor of the defendants, from which the plaintiff appealed.

*Bliss & Cadwallader*, for the appellants.

*J. Hubbell*, for the respondents.

*By the Court*, MILLER, J. By the contract made between the plaintiffs and the defendants, risks by fire, in the transportation of the goods were expressly excepted. Under the terms of the contract, I think, only ordinary risks were intended, and that the defendants were not excused if the loss was caused by the fault or negligence of the company or its agents or employees. (*Smith v. N. Y. Central Railroad Co.* 24 N. Y. Rep. 230. *Perkins v. The Same*, *Id.* 206. *Wells v. Steam Navigation Co.*, 4 Seld. 375.) The defendants, therefore, would be exempted from the claim of the plaintiffs

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to recover, in this action, unless their negligence as common carriers, in transporting the goods, contributed to produce the loss.

The question, then, is, whether the delay in forwarding the goods from the Western railroad depot, at East Albany, was unreasonable and established a case of negligence. I think it did not establish any such case. The goods arrived at East Albany on the 27th and 28th of June, 1861, were stored in the warehouse of the railroad company, and there remained until the 5th day of July, when the warehouse and its contents were destroyed by fire. The defendants had no direct notice of the arrival of the property ; but, according to the testimony, they were left to be called for, in the usual course of business, which was for the defendants to send a boat for them once a week, or once every two weeks. The agent of the defendants would come to ascertain whether the goods were there, and take them as soon as he thought there was enough to send a boat for. The agent was there on the 1st or 2d of July, and some conversation was had with him about bringing a boat to take the goods ; but it does not appear that any boat was sent for that purpose. The goods were not left in an exposed or dangerous place ; for the building was well built and well guarded against fire.

No particular time having been named, within which the goods were to be forwarded, the defendants were doubtless entitled to such time as would be fair and reasonable, in the ordinary course of the business in which they were engaged. From the evidence in the case, and the surrounding circumstances, it would seem that the delay in the transportation of the goods was not unreasonable, but in accordance with the usual course of business, and not beyond the ordinary time allowed for that purpose. There was no agreement that they should be forwarded within a given time, or at once, without any delay ; and it was by no means remarkable that they should have been left until a load could be obtained for transportation in a boat. There is certainly no direct evidence to

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show any particular neglect on the part of the defendants, and I am not aware of any rule which could compel the defendants to act *immediately* and transport what was on hand, without regard to the quantity, or the expense incurred by thus deviating from their common custom or practice in such cases. Neither is there any evidence in the case to show that the agent acted differently from what he always did, in reference to taking the goods from the railroad depot, to a boat, for the purpose of transportation.

If it be insisted that the few days in which the property remained at the railroad depot was an unusual delay, then may it not be urged with equal force that a loss of time would have been? That they should have been moved at once, without any delay and with all possible expedition? I am not aware of any case which has gone to the extent of holding that the time which the goods were detained in the present case, under the circumstances existing, was sufficient to make the common carrier liable. In *Michaels v. The Central Railroad Company*, (30 N. Y. Rep. 564,) to which we have been referred, where the goods were delivered to a railroad company by a connecting railroad company, to be transported to the owners, and they were detained some three days on the ground that by the regulations of the defendant they were not to be forwarded until the receipt of a bill of back charges, it was *held* that the company were not justified in the detention, and were liable for their loss. It will be observed that this case differs entirely from the one under consideration, where it appears that the defendants acted in entire conformity with the accustomed manner of dealing and of doing business.

It is said that the delay was at least evidence of neglect to be submitted to the consideration of the jury, as a question of fact. The plaintiff's counsel made no such request. If he had intended to claim that there was a disputed question of fact in regard to the defendants' negligence, he should have made a distinct request that it should be submitted to the jury. (*Barnes v. Perine*, 2 Kern. 18.) When the court

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assumes that the weight of the evidence is in a particular direction, and so decides, if no objection be taken to this course at the time, it is regarded as done with the assent of parties. They have a right to object, in all cases, where the verdict, either way, would not be set aside as unwarranted by the evidence, and if they do object, and demand the submission of the case to the jury, the demand must be complied with. (*Bidwell v. Lament*, 17 How.. 357.)

As no request was made to submit the question as to negligence to the jury, and as there is some evidence to sustain the decision of the judge, I think that the point last discussed is not well taken.

As I discover no error on the trial below, the judgment must be affirmed, with costs.

[ALBANY GENERAL TERM, September 17, 1866. *Miller, Hogeborn and Ingalls, Justices.*]

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HAWLEY vs. BUTLER and MARCELLUS.

The act of congress authorizing the arrest of persons as deserters, being in derogation of the common law, must be strictly pursued. The duties imposed by it are ministerial, and in the proper discharge of them the officer is bound to embrace the first opportunity to bring the prisoner before a competent tribunal, where he may be tried for the offense charged.

Where the plaintiff was arrested, without warrant, by a deputy provost marshal, on the charge of being a deserter, and taken by him to the office of the provost marshal, who, after examination, directed the deputy marshal to convey the plaintiff to the county jail, where he was kept in close confinement for several days: *Held*, that in so doing, the marshal and his deputy acted in violation of the statute and exceeded their authority, and were liable to an action. That they had no legal right to make such an unreasonable detention, before sending the plaintiff to a military commander, or a military post.

THIS was an action brought by the plaintiff to recover damages for the arrest and imprisonment of the plaintiff by the defendants while they were provost marshal and

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assistant provost marshal of the eighteenth district of New York. The cause was tried at the Schenectady circuit in April, 1866, before a judge and a jury. It appeared upon the trial that on the 31st day of August, 1863, the plaintiff was arrested by the defendant Marcellus, who was deputy provost marshal, at the railroad station, in Schenectady, without a warrant, and taken by him to the office of Butler, the marshal, who, after examination, directed his deputy, Marcellus, to convey the plaintiff to the county jail. This was done, and the plaintiff was kept in close confinement there until the 4th day of September, when he was taken to the provost marshal's office for the purpose of being sent to New York, but at his own request he was further held in custody until an answer could be received from a communication sent to Massachusetts, inquiring as to the plaintiff being a deserter. On the next day, the 5th of September, the plaintiff was discharged by the defendant Butler's order. The plaintiff was not sent to any military post, or military commander.

The defendants justified the arrest by proof that information had been received that the plaintiff was a deserter, and that he had at one time in his possession a pair of military pantaloons and overcoat. The plaintiff proved that he came from California with a battalion of cavalry for the state Massachusetts. He had charge of the sick, and expected the appointment of hospital steward. He was rejected by the surgeon, after his arrival at Boston, and left the battalion. He had not at that time deserted, and was not a deserter.

At the close of the evidence the court directed that the complaint be dismissed, and judgment of nonsuit entered, upon the ground that the facts in the case showed probable cause which justified the arrest and imprisonment of the plaintiff. The plaintiff excepted to the decision. Judgment was entered in favor of the defendants for costs, and the plaintiff appealed to the general term. The case was submitted on printed points.

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*Mitchell & Beattie*, for the appellant.

*William A. Dana*, for the respondent.

*By the Court*, MILLER, J. Even if the original arrest of the plaintiff was legal and valid, yet I think that his imprisonment in the county jail of Schenectady for several days afterwards was unauthorized and illegal, and that the action was maintainable for that reason.

The statute under which the defendants claimed to act, and which conferred the power to make the arrest, requires that the officer shall send the deserter to the nearest military commander, or military post. (*Laws of U. S. Sess. 1863, chap. 75, § 6.*) In the case under consideration the plaintiff was kept in jail for several days, without being sent to the nearest military commander or military post, as was required by the statute. It does not appear that he was kept in custody temporarily with a view of being sent as the law provided, prior to the time when he was brought up to be sent to New York, nor that the length of time he was thus kept in custody was necessary or proper, prior to his being taken to the proper place. The statute must be strictly pursued, as it is in derogation of the common law. The duties imposed under it were ministerial, and in the proper discharge of them an officer is clearly bound to embrace the first opportunity to bring the prisoner before a competent tribunal, where he might be tried for the offense charged. If the defendants had authority to detain the plaintiff in custody for several days, as they did, then they had legal power to do so for the period of a week or a month, or even for a longer time. They possessed no judicial functions which authorized them to investigate and to determine the question of the guilt or the innocence of the plaintiff. Under the circumstances as presented, it seems to me that the duty of the officer is plain, and definitely marked out, and to justify an arrest and detention he must pursue the statute with strictness and

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fideliſy. This the defendants apparently failed to do. They kept the plaintiff, who was entirely guiltleſs, incarcerated for a conſiderable period of time, with no poſitive proof againſt him, and while proteſting his innocence of the charge made. In ſo doing they acted in violation of the ſtatute and exceeded their authority. They had no legal right to make ſuch an unreaſonable detention, before ſending the plaintiff to a military commander, or a military poſt. If theſe views are ſound and correct, the court erred in granting the nonſuit and in diſmiſſing the complaint.

As a new trial muſt be granted, for the reaſons already given, it is not neceſſary to examine the other queſtions preſented.

The nonſuit muſt be ſet aſide, the judgment reversed, and a new trial granted, with coſts to abide the event.

[ALBANY GENERAL TERM, September 17, 1866. *Miller, Ingalls and Hogeboom, Juſtices.*]

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COLE vs. SAULPAUGH.

Where there is no limitation or reſtriction as to the manner in which an accommodation note is to be uſed, the payee has a right to apply it to the payment or ſecurity of an antecedent debt, or to ſuſtain his credit in any other way.

JEREMIAH E. VAN CLEEK procured the defendant to make a note for \$150 for his accommodation, payable to the order of the defendant, at the Merchants' Bank, two months after date, and dated July 11, 1858. Van Cleek transferred the note by indorſement to the plaintiff to pay a prior indebtedneſs from Van Cleek to the plaintiff with full knowledge on the part of the plaintiff that it was accommodation paper. Theſe facts having been found by Juſtice BACON, on a trial of the action before him without a jury, judgment was ordered for the plaintiff for the amount. The defendant excepted to the deciſion, and appealed from the judgment to the general term.

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*R. Raynor*, for the appellant.

*D. Coats*, for the respondent.

*By the Court*, MORGAN, J. The note was made by the defendant for the accommodation of one Jeremiah E. Van Cleek, and transferred to the plaintiff to secure the payment of a prior indebtedness from Van Cleek to him. This was doubtless a valid transfer of the note, although it appears that he knew that it was an accommodation note, when he took it. It does not appear that the note was diverted from its object, and yet it is made a question whether the plaintiff can recover upon it, as he took it to secure a prior indebtedness, and with notice that it was accommodation paper. The same objection, in principle, might be made if the defendant had indorsed the debtor's note to secure the payment of the same indebtedness.

In such a case it is not necessary that the holder should have parted with value, to entitle him to recover, although that question is frequently mentioned and is always important where there is a claim that the paper is diverted from its object. Where there is no fraud, no such question can arise; for it is sufficient that there is a valuable consideration as between the parties to the transfer. When there is no limitation or restriction as to the manner in which an accommodation note is to be used, the payee has a right to apply it to the payment or security of an antecedent debt; or to sustain his credit in any other way. (*Grandin v. Le Roy*, 2 Paige, 509. *Bank of Rutland v. Buck*, 5 Wend. 66. *Lathrop v. Morris*, 5 Sandf. 7. 1 *Parsons on N. and B.* 226. *Mohawk Bank v. Corey*, 1 Hill, 515.)

The judgment should be affirmed.

Judgment affirmed.

[ONONDAGA GENERAL TERM, JANUARY 8, 1865. *Morgan, Bacon, Foster and Mullin*, Justices.]

EDWARDS *vs.* BEEBE.

It *seems* there is no uniform rule of damages to apply to the various cases in *tort* which continually come before the courts for adjudication.

The courts do not, however, favor the doctrine of giving any thing more than the necessary and unavoidable damages in cases of *tort* without aggravation.

Where the referee allowed the plaintiff damages to the extent of the value of his horse, lost by occasion of a collision of boats at Schenectady, and added thereto interest up to the time of making his report, *held* that it was error to allow another sum as damages for the loss of the use of the plaintiff's horse in towing his boat to Rome.

THIS was an action to recover damages occasioned by a collision of boats on the Erie canal, whereby the plaintiff lost a horse by drowning. The collision occurred near Schenectady, in July 1862. There was a piece of iron on the defendant's boat running down the stern and under the boat, called a shoe, which had become loose so as to catch the tow lines of other passing boats. The plaintiff's tow line caught upon this shoe, which caused the collision. The referee found for the plaintiff upon the question of negligence, and assessed the value of the horse at \$100, to which amount he added \$11.60 interest from the time of the accident to the date of his report. The referee also allowed the plaintiff \$10 for the expense of hiring another horse to tow his boat to Rome.

The defendant made a case and exceptions and appealed from the judgment to this court. The questions litigated on the trial are sufficiently stated in the opinion of the court.

*Wm. Sanders*, for the appellant.

*Pomeroy Southworth*, for the respondent.

*By the Court*, MORGAN, J. We cannot reverse the judgment in this case for any supposed error of the referee in his conclusions of fact. The evidence was conflicting as to whether the defendant gave notice to the plaintiff of the danger of catching his tow line upon the catch of the defendant's boat. The distinction made by the defendant's coun-

sel—and to some extent by the referee—between the defendant's *giving* notice, and the plaintiff's *hearing* it, is without any legal significance whatever. The question is simply one of notice, and that implies that if notice was given, it was given in a tone of voice loud enough to be heard by the hands upon the plaintiff's boat. The plaintiff was entitled to recover the value of his horse, if the referee was right in finding, as he did, that he was without fault on his part for the collision of the two boats; and upon the question of fact, his report must be regarded as conclusive. The plaintiff's counsel cites authorities to show that the referee was also right in adding interest to the value of the horse. It is questionable whether the referee was technically right in saying that the law gives interest in such cases, as he seems to say in his report. But it is usual, and may be permitted, to give interest by way of damages in such a case, although I think it rests in the discretion of the jury or referee. But no exception is taken to this particular point in the finding of the referee, and it is therefore unnecessary to pursue the subject.

The referee also gives the plaintiff \$10 in damages for loss of the use of his horse from Schenectady to Rome. This is put upon the ground that the plaintiff was obliged to tow with three horses until he got to Rome, where he resided, and was delayed thereby one day, "which damaged the plaintiff by this delay to the amount of \$10." This finding is founded upon the plaintiff's evidence that he thinks it took him a day longer to come home, which was worth from \$10 to \$15. It might, I think, be objected to this evidence that it was a mere estimate, or matter of opinion. But the objection was general, and the question is, whether this damage was recoverable, and ought to have been added to the value of the horse, which was drowned in consequence of the collision. It must be acknowledged that we have no uniform rule of damages to apply to the variety cases in tort which continually come before us for adjudication. The courts in

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this state, however, do not favor the doctrine of giving any thing more than the necessary and unavoidable damages, in cases of *tort* without aggravation. It is a general rule that the party complaining must show that the particular damages in respect to which he proceeds are the legal and natural consequences of the wrongful act imputed to the defendant. (*Sedg. on Dam.* 82. *Clark v. Brown*, 18 *Wend.* 229.) This is also the rule in the admiralty courts, in cases of collision. Hypothetical and consequential damages are excluded. (*Sedg.* 469, n. 1.)

It does not appear that there was any necessary damage to the plaintiff in the case at bar growing out of his loss of the use of this particular horse. There is no evidence that he could not have bought another horse at Schenectady, and the amount of his damages would then be limited to the value of the one he lost.

I think the legal and natural damages do not extend beyond this, and that the referee erred in allowing any thing for the use of a horse, which, for aught that appears, the plaintiff could have purchased at Schenectady as well as at Rome.

Besides, the allowance of interest on the value of the horse would seem to cover this very item, as it is substantially the same thing whether the plaintiff is allowed for the use of the horse or the money value of the horse. But as the damages can be separated, I think we may affirm the judgment as to the value of the horse with the interest added, and reverse it as to the residue, without costs to either party on this appeal.

The result is that the judgment must be affirmed as to \$111.64, and reversed as to \$10, improperly allowed as damages by the referee for the loss of the use of the horse; without costs of appeal to either party.

Judgment accordingly.

[ONONDAGA GENERAL TERM, JANUARY 3, 1865. *Morgan, Bacon, Foster and Mullin*, Justices.]

## CAMPBELL vs. SWAN.

The sale of lands under a statutory foreclosure of a mortgage is void where there are no bidders present at the sale except the auctioneer, who bids in the property on behalf of the mortgagee.

An assignee, who takes an assignment of a contract of purchase, to secure a debt due to him from the assignor, cannot, on default of payment, maintain an action of ejectment against his assignor to recover the possession of the lands.

Whether a statutory foreclosure of a mortgage operates to bar an *equitable* interest in the land, unless such interest is specified in the statute as entitling the owner of it to notice of the foreclosure, except in favor of *bona fide* purchasers without notice of such equitable interest? *Quære.*

THIS was an action of ejectment. One Henry D. Rolph, in 1850, purchased the premises of Jared House, and gave back his mortgage for \$1200, part of the purchase money. House assigned the mortgage to the plaintiff, Lewis Campbell, in January, 1863; there being due and unpaid on it the sum of about \$500.

Rolph sold the premises by an executory contract of sale to the defendant, Jefferson L. Swan, in January, 1852. Swan went into possession and paid up the contract in full within three years, but has never received a conveyance of the premises. On the 3d day of August, 1854, he assigned his interest in the premises and in said contract, by writing, to Charles W. and Charles M. Stevens, assignees of Jesse Brown, to secure the payment of the sum of \$500, which was transferred by certain mesne assignments to the plaintiff on the 20th day of April, 1863, he paying therefor the sum of \$200. It appeared on the trial that Swan, the defendant, had only paid \$160 of his indebtedness to C. W. and C. M. Stevens and their assigns. On the same day that Campbell took this assignment, he commenced proceedings by advertisement under the statute, to foreclose the mortgage, and on the 25th day of July the premises were offered for sale under such proceedings, by his attorney, and struck off to the plaintiff; no one being present at the time except his attorney. No notice of foreclosure was served upon the defendant.

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The action was referred, and resulted in a judgment in favor of the plaintiff. The defendant having made a case and exceptions, appealed from the judgment.

*C. D. Adams*, for the appellant.

*B. Knox*, for the respondent.

MORGAN, J. The defendant was in possession of the mortgaged premises under a contract of sale. Although he had paid up the vendor, he had not paid up the mortgage; and having purchased expressly subject to it, he was liable to be turned out of possession by its foreclosure in equity, if not by advertisement under the statute. He had however transferred his contract and his rights under it, as security for the payment of another demand. The plaintiff afterwards became the assignee of the defendant's contract thus transferred, and also of the mortgage, the defendant still remaining in possession of the premises. The question whether the plaintiff, as assignee of the defendant's contract, could obtain possession of the premises, was not raised upon the trial nor discussed by the counsel.

The referee must have held that the foreclosure of the mortgage extinguished the defendant's interest under the contract, although he was not made a party. And perhaps it was not proper to make him a party, as his claim or equity was not such a title as could be put upon record. The statute expressly excepts *executory contracts* for the sale or purchase of lands from the operation of the recording acts. (1 R. S. 762, § 38.) The defendants not having an interest or title which could be recorded, it was unnecessary to serve him with a copy of the notice of foreclosure, as this notice is to be served only upon subsequent *grantees* of the premises, whose conveyance shall be upon record at the time of the first publication of the notice. (*Laws of 1844, chap. 346, § 1.*) The defendant clearly was not a subsequent *grantee*, within

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the meaning of this section. But still he had an equitable interest in the premises, and being in possession, such possession was notice of his right to all the world. And in an action in a court of equity, it would seem to be necessary to make him a party, in order to foreclose his rights under the contract. (2 *Hilliard on Mort.* 110. *Story's Eq. Pl.* §§ 193, 197. *Williamson v. Field*, 2 *Sandf. Ch.* 533. *Watson v. Spence*, 20 *Wend.* 260. *Fuller v. Van Geesen*, 4 *Hill*, 174.)

It is a question of some importance to the profession to know how far the foreclosure of a mortgage by advertisement under the statute operates upon those equitable interests, which are not specified, but which are recognized both at law and in equity as substantial rights of action. It is doubtless desirable to protect a *bona fide* purchaser against latent equities, but it would be wrong to cut off parties by a statutory foreclosure of the mortgage, whose claims are known, but who are not entitled to notice.

The effect of a statute foreclosure is, however, declared in section 8 of the Laws of 1844, chapter 346 : (1.) The *mortgagor, his heirs and representatives* are concluded by it. (2.) All persons claiming under him or them by virtue of *any title subsequent* to such mortgage. (3.) Any person having a lien by any judgment or decree subsequent to such mortgage ; and (4.) Any person having any lien or claim by or under such subsequent judgment or decree, *who shall have been served with notice of sale as required by law*. It must be acknowledged that a statutory foreclosure against persons, entitled to notice, is void as to such persons, unless they have been served with notice as required by law. I should be better satisfied if the statute had directed notice to be served upon all persons who would be entitled to be made parties in a court of equity. The statute undertakes, however, to cut off the heirs by a statutory foreclosure of the mortgage, without being served with notice, unless the effect is restricted by the latter part of the section. And it must be acknowledged that subsequent purchasers having only an equitable title,

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although in possession of the mortgaged premises, have generally been considered as concluded by a sale under the statute of which they have had no notice, upon the ground that the statute embraces subsequent *equitable* as well as legal titles. (1 *Hill*, 110. 6 *id.* 67. 2 *Denio*, 353.) But it is obvious that there is no reason for not giving them notice. Their possession is sufficient notice of their claims; and the statute should provide for serving them with notice before barring them of their equity of redemption. If we should construe the statute as having to do mainly with the legal title, it might be held that it did not include equitable interests, not specifically provided for, which are proper subjects for adjustment in a court of equity. The effect of such a construction would be to compel a foreclosure in equity where there were known equitable interests to be dealt with not specifically enumerated in the statute regulating the foreclosure of mortgages by advertisement.

It may be that notice to the mortgagor, who had no interest in this case, operated to bar the equity of redemption of the real party in interest; and thus it may happen that the notice of sale may never come to the knowledge of the party most interested. Indeed, pains are taken in many cases to publish the notice in some obscure paper so as to evade giving the notice to the party in interest; and thus the party really owning the equity of redemption may be deprived of an interest as valuable to him as though he had taken a conveyance and put it upon record so as to entitle himself to notice of the foreclosure. It is not his fault that his title, so called, is not recorded. It is only an *equitable* title, and not the subject of record. If, however, we construe section eight as involving a subsequent *equitable*, as well as a *legal* title, then it is apparent that the foreclosure will operate to cut it off without notice.

It was doubtless competent for the legislature to declare who should have personal notice, and what interest should be cut off by publication and posting, without further notice.

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But having enumerated certain claims, it may be questioned whether others, not enumerated, are thus foreclosed.

But without discussing these questions further, it will be only necessary to inquire in this case, whether the plaintiff acquired the title of the mortgagor by the attempted foreclosure; for if he did not, I think he is in no situation to maintain this action. Formerly, it was held that the mortgagee could not, upon general principles, be both buyer and seller. The statute now allows him to become the purchaser, if he purchases *fairly* and in *good faith*. (2 R. S. 546, § 7.) It is questionable, at least, whether the auctioneer who conducts the sale, can bid in the property for himself or another. The statute allowing the mortgagee to become the purchaser *fairly* and in *good faith*, did not, I think, contemplate that he should be the auctioneer as well as the purchaser. His crying off the property to himself, is not such a sale as the statute authorizes him to make. Sales at public auction are regulated by certain well known rules, which are necessary to create competition and enhance bids for the property. No one would regard a sale at auction as a *fair sale*, if the auctioneer should cry off the property to himself. It is going far enough to allow the attorney to become the auctioneer when his client is a bidder at the sale. But if the sale was unobjectionable for the reason that the attorney cried off the property to his client, who was not present, then I think it should be held void, upon the ground that it was not a sale of the premises at *public auction* within the meaning of the statute. It might have been good, if the plaintiff had been present to bid in the property; but it does not satisfactorily appear, nor is it found by the referee, that any one was present when the attorney offered the property for sale and struck it off to himself on behalf of his client who was absent. There can be no legal auction if no one is present but the auctioneer, and the sale should be postponed.

If I am correct in these views, it follows that the plain-  
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tiff's title under the mortgage is that of a mortgagee before foreclosure, especially as to the defendant; and that he cannot maintain ejectment upon such a title. (2 R. S. 312, § 57.) It is not stated in the case that the defendant agreed to pay off the mortgage, but it is stated that he purchased subject to the mortgage. Unless he agreed to pay the mortgage debt, he is not in default upon his contract, so that his vendor can turn him out of possession. If therefore the plaintiff has taken the title of the mortgagor, and occupies his position, he cannot maintain ejectment against the defendant under his contract, without showing that he is in default as to his payments.

Can the plaintiff maintain ejectment as the assignee of the defendant's contract? The assignment, as before stated, was by way of security for a debt which the defendant owed to the assignees of Jesse Brown. It is in the nature of a mortgage to secure the balance of the debt to Brown's assignees. It may doubtless be foreclosed in equity as a mortgage: but I know of no ground upon which it can be treated as investing the plaintiff with a legal right to the immediate possession of the premises, as against the defendant.

The defendant's title under the contract, coupled with the possession, is, as we have seen, in *equity* only. He may defend his possession under it by showing that he has kept up the payments; but his assignee, who takes an assignment of the contract merely as security, has, I think, no such claim as would enable him to obtain possession of the premises. In *Lessee of Willink v. Niles*, (1 Peters' C. C. Rep. 429,) it was held that an agreement by the lessor of the plaintiff for the sale and conveyance of the land to the defendant, cannot be given in evidence in a trial at law, as it is at most only evidence of an *equitable* title. It is doubtless as necessary now as formerly that the plaintiff should be clothed with the legal title, in order to support an action of ejectment. (Til-

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*linghast's Adams on Eject.* 32.) Such being the law, as I understand it, there are no grounds upon which the plaintiff can maintain his action of ejectment as assignee of the defendant's contract.

Upon the whole case I have come to the following conclusions :

(1.) That it is questionable whether a statutory foreclosure of a mortgage will bar an equitable interest in the land, unless such interest is specified in the statute as entitling the owner of it to notice of the foreclosure, except in favor of *bona fide* purchasers without notice of such equitable interest.

(2.) That the sale of the premises was absolutely void in this case, because there were no persons present, and the auctioneer could not strike off the premises to his client, who was absent.

(3.) That the assignee of the purchaser of lands under an executory contract of sale, who takes the assignment as security for the payment of a debt, cannot on default of payment, recover possession of his assignor, in an action of ejectment.

BACON and FOSTER, JJ., concurred in holding the sale void, but expressed no opinion as to the effect of a statutory foreclosure upon the equitable title of the defendant.

MULLIN, J. dissented.

[ONONDAGA GENERAL TERM, JANUARY 8, 1865. *Morgan, Bacon, Foster and Mullin, Justices.*]

DWIGHT *vs.* PHILLIPS.

Where it did not appear, by the affidavits on file, that notice of a statutory foreclosure of a mortgage was served upon the mortgagor; *Held* that it was ineffectual to transfer the legal title to the plaintiff, who purchased at the sale.

Where the affidavits on file showed service by mail, on the mortgagor, at a particular place, without stating it to be the place of his residence; *Held* that the omission was fatal, and could not be supplied by an amendment on the trial which involved the validity of the foreclosure.

The statutory proceedings to foreclose a mortgage are not *proceedings in court*, so as to authorize the court to supply omissions or remedy defects in the affidavits.

*It seems* that the rights of a *prior purchaser*, in possession of lands under an executory contract of sale, are not affected by the statutory foreclosure of a subsequent mortgage, although he is served with notice of sale.

*It seems* such purchaser can safely make payments on the contract to his vendor, until he has actual notice of the subsequent mortgage.

**A** PPEAL from a judgment entered upon the report of a referee in favor of the plaintiff.

The action was ejectment to recover possession of certain premises in Salina. *Nelson Phillips*, as owner of the premises, entered into an agreement to sell them to the defendant in June, 1857, by an executory contract of sale. The plaintiff claimed title under a statutory foreclosure of two mortgages; one of which bore date February 3, 1858, executed by Nelson Phillips to Margaret Ann Granville; and the other of which bore date September 21, 1858, executed by Nelson Phillips to the plaintiff, John Dwight. By the terms of the purchase, the defendant was to pay Nelson Phillips \$550, besides certain partnership debts of Nathan and Nelson Phillips, and was to have immediate possession. He paid the \$550, and a large portion of the partnership debts, from time to time, from 1857 to 1863, and took, and continued in, possession of the premises until the commencement of this action, but without notice of the subsequent mortgages until the plaintiff had become the purchaser under the foreclosure; at which time he had paid on his contract the sum of \$959.86, leaving

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a balance still due and unpaid. On the 17th day of August, 1858, Nelson Phillips executed an agreement to the defendant, extending the time of payment for such balance for five years from date.

It appeared upon the trial that Lot Phillips was in the apparent possession of the premises at the time of the statutory foreclosure of the mortgage, the premises consisting of a small lot and blacksmith's shop, in which the business was carried on in his name, although he was in fact a partner of the defendant, the name of *Lot Phillips* being used for the purpose of preventing the creditors of the defendant from collecting their demands against him. Notice of sale was served upon Lot Phillips, but not upon the defendant.

There were certain objections taken to the proceedings to foreclose the mortgages, and to the affidavit of the auctioneer, which sufficiently appear in the opinion of the court. The referee held that the *equitable title* of the defendant should be protected so far as he had made payments upon his contract prior to notice of the mortgages; that the plaintiff acquired the legal title to the premises under the foreclosure; and he directed judgment in favor of the plaintiff, to recover the possession of the premises. He also directed a decree to be entered, allowing the defendant sixty days to pay the plaintiff \$1124.22 with interest, besides the taxed bill of costs, provided it did not exceed the sum of \$1319.04, (balance due on the contract,) and upon such payment, required the plaintiff to convey the title to the defendant, with covenants of warranty, against his own acts. The defendant excepted.

*Ohas. Andrews*, for the appellant.

*Wm. J. Wallace*, for the respondent.

*By the Court*, MORGAN, J. The plaintiff claims title through the foreclosure of two mortgages, executed by the former owner, Nelson Phillips, *subsequent* to the contract

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made by the defendant for the purchase of the same premises. The case shows that the defendant is in possession claiming under his *prior* executory contract of purchase. Without going into the question of the defendant's rights under his contract, it is sufficient to dispose of this case to look into the plaintiff's title. As mortgagee or assignee of the mortgage, he cannot maintain this action. But if he has acquired the title of the mortgagor by a valid foreclosure of either mortgage as against the mortgagor, he may take *his* position as to the defendant, and upon default of payment of the moneys due upon the contract by the defendant, may doubtless turn him out of possession. And I think the referee was right in holding that the defendant may redeem the premises from the lien of both mortgages by paying to the plaintiff the balance due upon his contract, even after a valid statutory foreclosure ; and also that the defendant is entitled to all payments made to the mortgagor in good faith before notice of the mortgages. Whether the pleadings admit of the *affirmative relief*, granted to the defendant in this case, is at least doubtful.

But, in my opinion, the plaintiff should have been nonsuited for the reason that he failed to show a valid statutory foreclosure of either mortgage.

As to the mortgage to Margaret Ann Granville, there is no proof that notice of sale was ever served upon the mortgagor. As to the mortgage to the plaintiff himself, there is no affidavit that the mortgagor, or the other parties served by mail with notice of sale, resided at the several places to which the notices were directed. This was necessary to make a good service. (2 R. S. 545, § 3, *sub. 3. Laws of 1844, ch. 346, p. 529.*)

As the plaintiff has failed to make title under these statutory foreclosures, it is evident he must fail upon a new trial, unless he is allowed to amend the affidavit so as to show that the persons served by mail with notice of sale, respectively resided at the places to which the notices were directed. It

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is very questionable whether such an amendment can be allowed by the court, although new affidavits might perhaps be filed and recorded, which would lay the foundation of another action. The statutory proceedings to foreclose a mortgage are not *proceedings in court*, so as to authorize the courts to remedy defects in them. It has always seemed to me that when a party is in possession under an *equitable title or claim*, the holder of a subsequent mortgage upon the premises might obtain his object much better by a foreclosure in equity. In this case, it seems to me that the plaintiff might make the defendant a party to a foreclosure of his mortgage in equity, and the decree might provide the terms upon which the defendant should take the legal title or be foreclosed of his equity. It will do no good to serve him with notice of a statutory foreclosure, as he is not a *subsequent grantee* within the meaning of section 3 of the statute already referred to, so as to authorize service of notice on him ; nor is he barred by the provisions of section eight, as he does not claim by title *subsequent* to the mortgage. For the same reason the service of notice of the foreclosure upon *Lot Phillips* was unavailable to cut off the equitable title of the defendant under his contract of purchase. The foreclosure was doubtless subject to the *prior equity* of the defendant, and did not in any manner impair his right to a conveyance upon paying up the balance due, including such sums, if any, as he had paid to his vendor in his own wrong, *after* actual notice of the claim of the plaintiff. (*Moyer v. Hinman*, 13 N. Y. Rep. 180.)

But these questions are not necessarily involved in the decision of this appeal, as it is sufficient to hold, as we must, that the plaintiff failed to show a valid foreclosure as against the mortgagor.

Judgment reversed, and a new trial ordered, with costs to abide the event.

[ONONDAGA GENERAL TERM, April 4, 1865. *Morgan, Bacon, Foster and Mullin*, Justices.]

AUGUSTUS C. MOORE and IRA H. MOORE *vs.* JAMES T.  
HAMILTON.

The legal effect of an assignment of a mortgage from the mortgagee to the mortgagor is to extinguish it, so as to let in subsequent liens.

Where the defendant, in an action of ejectment, claimed that the plaintiffs purchased the premises at the defendant's request, under a verbal agreement that the latter should occupy and have the premises as his own, in consideration that he would support their mother during her life, which he alleged he had performed, but which agreement as well as performance was denied by the plaintiffs; *Held* that letters written by the vendor to the plaintiffs at the instigation of the defendant, or with his knowledge, containing propositions in relation to the sale, inconsistent with such an agreement, were admissible in evidence as part of the *res gesta*.

The death of one of the plaintiffs, and the substitution of his successor in interest, pending a reference of the action, does not operate to supersede the order of reference, or invalidate the prior proceedings. The plaintiffs, in such a case, are entitled to the benefit of the prior proceedings already had in the action, including the order of reference, when such order has been duly entered, whether by consent of the parties or upon motion in actions which are referable without such consent.

**A**PPEAL from a judgment for the plaintiff entered upon the report of a referee.

After the action had been partly tried, Charles Moore, one of the plaintiffs, died, and Ira H. Moore was, by order of the court, substituted in his place. The action was again brought to trial before the same referee, when the defendant objected to proceeding with the trial until a new referee should be appointed; which objection was overruled and the trial proceeded as if no change of parties had occurred. The reference was ordered, on consent of the original parties.

The action was ejectment, to recover the possession of certain premises, in the town of Fabius, formerly owned by William Frink. The plaintiffs claimed title through a sale of the lands upon a judgment in favor of Horace Wheaton, docketed February 22, 1836. The sale was made February 25, 1839, and no one redeeming, a sheriff's deed was executed to George Petit, May 25, 1840. Petit conveyed the premises to the plaintiff September 25, 1840. The defendant, after

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setting up certain facts in avoidance of the sheriff's deed, averred that on the 20th day of February, 1860, he purchased and took a conveyance of the same premises from William Frink, and immediately went into possession, and that when Petit conveyed to the plaintiffs, the said Frink was in possession holding adversely.

As a further equitable defense, the defendant alleged that on the 16th day of February, 1838, Frink executed a mortgage upon said land to Abigail Middlebrook, his mother-in-law, and the mother of the plaintiffs, to secure the payment of \$1437, payable in ninety days; and that the sheriff's deed was subject to that mortgage; that afterwards, in November, 1840, the said Abigail Middlebrook, being the owner and holder of said mortgage, entered into an agreement with Frink by which, in consideration that Frink would board and maintain the said Abigail during her natural life, she would give and transfer the said mortgage to him, and the same was transferred to him accordingly; that he did, in fact, support and maintain her until she died, in 1855. After her death, Frink sold, assigned and transferred the said mortgage and all his interest therein to the defendant. The plaintiffs, in reply, among other things, stated that a suit in chancery had been commenced by Mrs. Middlebrook to foreclose this mortgage, which was referred to Victory Birdseye, who found that the same was fraudulent and void as to Petit; that they afterwards purchased the premises at the request of Frink, and paid Petit \$1000 for the same, for the purpose of furnishing a home for Frink and his wife, who was a sister of the plaintiffs, as well as to furnish a home for Mrs. Middlebrook, he, the said Frink agreeing to support her; and thereafter Frink remained in possession as tenant of the said plaintiffs, supporting the said Abigail in part for the rent thereof, and disclaiming the ownership of the same, but admitting that the plaintiffs were the owners, until the death of the said Abigail in 1856; that he continued in possession until 1859, when he abandoned the premises, and the plaintiffs

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leased them to one Anson Ellis, who took immediate possession under said lease as tenant of the plaintiffs, and remained therein until the defendant wrongfully got possession. The plaintiffs also alleged that the mortgage to Mrs. Middlebrook was paid and satisfied ; also that it was barred by the statute of limitations.

The referee found that the several conveyances mentioned in the pleadings were duly executed as therein stated ; that the said judgment became a valid lien on the premises from the time it was docketed ; and that Frink was in possession when the sheriff conveyed to Petit ; that when the original plaintiffs, Charles and Augustus C. Moore, took a conveyance of the premises, they entered into an agreement with Frink to support their mother Abigail, and that, as compensation therefor, he might occupy the premises as tenant without payment of other or additional rent ; that Frink continued in possession until the 20th day of January, 1860, when the defendant entered and claimed to hold the same as grantee of Frink, under a deed from Frink to him made on that day. The referee also found the execution of the mortgage from Frink to Mrs. Middlebrook in February, 1838 ; that on the 20th day of February, 1860, Frink claimed to own the said mortgage by a transfer of the same from her to him ; and that the same was assigned by her to him. There was evidence tending to show that this transfer was made to Frink in October, 1840, on condition that Frink would support her during her life. The referee also found that Mrs. Middlebrook, on the 14th day of October, 1840, satisfied the said mortgage, and delivered the satisfaction piece to the plaintiffs. The questions arising upon the trial, with the exceptions taken by the defendant to the admission of certain evidence, are sufficiently detailed in the opinion of the court.

*D. Pratt*, for the appellant.

*Wm. H. Shankland*, for the respondent.

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MORGAN, J. The printed case contains much that has but little, if any, bearing upon the questions at issue between the parties. The title of the plaintiffs is very clearly proved, and must prevail, unless it is avoided by some of the several defences set up in the answer and proved upon the trial.

(1.) The defendant claimed to be in possession as the assignee of a mortgage given by the original owner of the premises, William Frink, to Abigail Middlebrook, February 16, 1838, and which is prior to the lien of the Wheaton judgment under which the plaintiffs claim title. If it is conceded that Mrs. Middlebrook afterwards assigned this mortgage to the mortgagor, William Frink, for a valuable consideration, it is not perceived what right the mortgagor took which could be transferred to the defendant in this action. The legal effect of an assignment of the debt to the debtor himself, for a valuable consideration, would be to extinguish the obligation. If there is any equitable ground upon which the lien of a mortgage in such a case can be preserved for the benefit of the assignee of the mortgagor, it does not appear in this case. The reissuing of the mortgage by the mortgagor to the defendant in this action for the purpose of overturning a lien subsequent to the date of the mortgage, is such a palpable fraud upon creditors and subsequent purchasers as to destroy all pretense of equity.

If I understand the agreement under which the mortgage was given, it was to insure the support of Mrs. Middlebrook during her life. This, I think, was a verbal arrangement, while the mortgage in terms provided for the payment of \$1437. The pretended assignment of this mortgage by Mrs. Middlebrook back to the mortgagor was upon the same verbal arrangement. If there is any truth in this statement, the position of the parties was not changed by the transfer of the mortgage from Mrs. Middlebrook to the mortgagor. It was without any valuable consideration, and left the property still the property of Mrs. Middlebrook, and she was competent to satisfy it, even after its formal transfer to Frink; although

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the evidence does not show that it was *after*. The defendants' answer states that it was transferred to him in November, 1840, and according to the report of the referee, she executed a satisfaction piece to the plaintiff in the previous October.

(2.) As the defendant could not under any aspect of the case protect his possession under the Middlebrook mortgage, the objections to the declarations of Frink before the pretended assignment of it to the defendant, although well taken, are of no importance; and may, I think, be disregarded on this appeal.

So far as the declarations of Frink, while in possession, tended to show the character of his possession, and whether adverse or not, they were clearly competent. And I am of opinion that the evidence fully justifies the conclusion that he did not claim as owner, but only as tenant of the plaintiffs.

(3.) It is claimed by the appellant that there were several errors committed by the referee in the admission of irrelevant evidence, especially in the admission of a letter from Judge Petit to A. C. Moore, one of the parties, and the letter of Moore in answer to it.

But the defendant, among other things, claimed to hold the premises under a verbal agreement that they were to be his upon condition that he supported Mrs. Middlebrook during her life time. It was competent for the plaintiff to disprove this agreement, and as there was evidence tending to show that the letter of Judge Petit was written with the knowledge of Frink, and at his instigation, it was clearly competent as part of the *res gestae*. It contained a proposition to Moore to purchase the premises for the purpose of furnishing a home for Mrs. Middlebrook; and the answer of Moore contained an acceptance of the proposition. This arrangement was quite inconsistent with the claim which the defendant made upon the trial in respect to that transaction, and I think the referee decided correctly in admitting the evidence.

This disposes of all the questions of any importance bearing upon the merits of the case.

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(4) The appellant, however, insists that the reference fell through, in consequence of the death of one of the plaintiffs, and that it could not be revived by a revival of the action. One of the grounds stated is, that the reference was by consent of the parties, and *non constat*, that the new parties would consent to a reference.

I am of opinion, however, that the revival takes up the case where the death of the party leaves it. Formerly, it was usual in cases in equity, for the order of revivor to provide for giving the new parties the benefit and advantage of the proceedings already had in the action. But I am not aware that any authority from the court is necessary to give effect to the prior proceedings in the cause. The legal effect is, I think, to authorize the continuance of the proceedings from the point at which they were interrupted by the death of the party. Under the Code, (§ 121,) the death of a party does not abate the action, but the court on motion may allow it to be continued by the successor in interest. It would be a great hardship to the parties to construe this action in such a way as to require the plaintiffs to begin *de novo*. Unless we require this much, we must construe it in such a way as to allow the plaintiffs the benefit of the proceedings already had in the action, including the order of a referee when one has been duly obtained, whether by consent of the parties, or upon motion in causes which are referable without such consent.

Nothing appears in the case, or exceptions, which, in my opinion, calls for a reversal of the judgment.

BACON and FOSTER, JJ. concurred.

MULLIN, J. dissented, being of opinion that the letters were inadmissible.

Judgment affirmed.

[ONONDAGA GENERAL TERM, April 4, 1865. *Morgan, Bacon, Foster and Mullin*, Justices.]

HYLAND *vs.* LOOMIS.

The county court has jurisdiction, upon the written consent of the parties, to order a reference in a case brought before it by appeal from a justice's court, where there is an *issue of fact* joined between them.

**A**PPEAL from the order of a county court refusing to set aside a judgment entered up in that court on the report of a referee, in an action commenced in a justice's court, and brought into the county court by appeal, and referred by the latter court upon the written stipulation of the parties.

*H. C. Southworth*, for the appellant.

*D. Pratt*, for the respondent.

*By the Court*, MORGAN, J. On a re-examination of the question presented in this case, we are of opinion that section 270 of the Code of Procedure authorizes the county court to order a reference of a cause brought into that court by appeal, where there is an *issue of fact* joined and pending in that court and which is referable under that section. While it would seem that section 366, sub. 3, as amended in 1862, made it peremptory upon the county court, upon a summary issue of fact joined in that court, to proceed to a trial by jury, still we are of opinion that its meaning is qualified by sub. 4, which provides that the *issue of fact* so joined or brought up on appeal shall be tried in the same manner as actions commenced in the Supreme Court. Our attention was not called to section 8 of the Code, upon the former argument. By that section the provisions of sections 270, 271 and 272 are made applicable to actions pending in the county court, except when otherwise provided. This provision confers upon that court the necessary authority to proceed by reference in all actions triable therein, in the same manner as the Supreme Court may proceed in like cases.

And as the report of the referee upon the whole issue is to

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be regarded as the decision of the court, (§ 272,) there is no difficulty in reviewing it under section 366, subdivisions 5 and 6, or in granting a new trial under section 30, sub. 13.

The order must be affirmed, but without costs.

[*Re-argued at the ONONDAGA GENERAL TERM, April 4, 1866. Morgan, Bacon, Foster and Mullin, Justices.*]

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## KROHN vs. OECHS.

It is well settled that when a loss to cargo, from leakage or otherwise, occurs in the port where it is laden, and before the voyage begins, the carrier is liable for its value at such port. But when the loss happens after the vessel has left the port of shipment, then the value of the goods at the place of destination, deducting the charges, furnishes the true rule of damages.

THIS action was brought by the plaintiff, a common carrier, for freight on a lot of wines, olive oil, &c. from Bordeaux to New York. The defendant set up a counter claim for loss by leakage of wine from some of the casks. It was proved that the wine was properly stowed and dunnaged. That the stowage was by the defendant's men, and the port warden proved that when he examined the cargo in this port he found it well stowed and dunnaged. There is no evidence to show at what period of time the injury occurred. The judge charged the jury that if the damage was caused by the negligence of the captain in placing too much weight on the casks, the defendant was entitled to counter claim the value. In the course of the trial he confined the defendant to proof of the value at the port of shipment, and excluded proof of value at the place of destination; to which the defendant excepted. The jury allowed the counter claim, and assessed the damages at the price of the wine at Bordeaux. Judgment was entered in favor of the plaintiff for \$436.25, damages and costs, and the defendant appealed.

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*J. H. Dukes*, for the appellant. I. The court erred in holding that the measure of damages was the cost of the wine at Bordeaux, the place of shipment, and excluding evidence as to the market value of the wine at New York, the place of destination. (*Brand v. Bowlby*, 2 B. & Ad. 932. *Bracket v. McNair*, 14 John. 170. *Amory v. McGregor*, 15 id. 24. *Van Winkle v. U. S. Mail Steamship Co.*, 37 Barb. 122. *Angell Law Carriers*, § 482, and following. *Sedgwick on Damages*, 356, marginal paging. *The Joshua Baker*, Abb. Adm. Rep. 215. *The Gold Hunter*, Blatch. & How. Rep. 301. *Arthur v. Schr. Cassius*, 2 Story, 81. *Green v. Clarke*, 2 Kern. 343.)

II. The court erred in instructing the jury: "If you find there were 225 gallons out, then the amount of your verdict will be \$247.79, adding interest. If you find the number of gallons was 300, the amount will be \$219.72." These instructions were based on the idea that the measure of damages was the cost of the wine at Bordeaux.

*J. Buchanan Henry*, for the respondent. I. The judge's ruling was correct, and judgment should be affirmed. The measure of damages, where goods are lost before the ship of the carrier leaves the port of lading, is the value of the goods at that port, and not the value at the port of destination, less the cost of transportation. This was decided, after full review of leading cases, in *Lakeman et al. v. Grinnell et al.* (5 Bosw. 625. Also see *Smith v. Richardson*. 3 Caines, 219; *Wheelwright v. Beers*, 2 Hall, 391; *Watkinson v. Laughton*, 8 John. 215; *Dusar v. Murgatroyd*, 1 Wash. C. C. 13.) The plaintiff's vessel lay in port for a week after these casks had been stowed; and (adopting the theory of the defendant) the crushing weight placed in loading on top of the casks, must, by the law of gravitation, have begun to act from the very moment the weight was so imposed, causing the leakage and loss of the wine while the ship was yet in the port of Bordeaux, and before she began her

voyage. This would bring it under the rule laid down in *Lakeman et al. v. Grinnell et al.* (5 Bosw. 625,) and warranted the judge in ruling as he did.

II. The cases where the rule adopting the price at the port of destination is applied, are uniformly cases where the voyage has been proceeded on before the loss occurred; and it is proved that the goods were carried away from the port of lading. (*Watkinson v. Laughton*, 8 John. 213. *Elliott v. Rossell*, 10 id. 1. *Bracket v. McNair*, 14 id. 170. *Amory v. McGregor*, 15 id. 24.)

III. Where the cargo is lost before proceeding on the voyage, the cost or home value is the only certain rule, and it affords an exact indemnity to the shipper and is just to the carrier. In this case, to have taken the value at New York would have involved speculative inquiries into violent fluctuations of price, dependent not upon the great law of supply and demand, but upon the violent leaps or bounds of a paper currency, affected favorably or unfavorably by political causes, or the elation or depression following upon military successes or reverses. The testimony of the defendant's agent is, that this wine cost in Bordeaux only 30 cents a gallon; and yet the defendant seeks to compel the plaintiff to pay \$1.16 per gallon, or nearly 400 per cent profit! Therefore, to hold that the rule of damage should have been the price in New York would, owing to the disorder of the currency, work monstrous injustice to the carrier.

IV. Admitting that the plaintiff was in fault, still the testimony shows that the defendant, too, was to blame for the stowage, as these casks were stowed by the defendant's own chosen stevedores. This circumstance should incline the court to construe the rule of damages leniently to the carrier.

V. If the appellate court does not affirm the judgment, it must order a new trial, so that the plaintiff may, under such ruling on the question of damages, be permitted to show what the real market value of this wine was in New York. Under

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the ruling of the learned judge below, it would have been irrelevant for the plaintiff to go on and show the value at the place of destination. A new trial only can be ordered under the circumstances. (*Chouteau v. Suydam*, 21 *N. Y. Rep.* 185. *Boyd v. Foot*, 5 *Bosw.* 110. *Halsey v. Flint*, 15 *Abb.* 368. *Griffin v. Marquardt*, 17 *N. Y. Rep.* 28. *Witherhead v. Allen*, 28 *Barb.* 661. 2 *Whit. Pr.* 753.)

INGRAHAM, J. There is a distinction between the cases, arising out of the inquiry at what place the loss occurred. In some of the cases the action was for not bringing the goods from the port of departure; and in such cases the rule of damages is the difference between the value of the goods at the place of shipment and the value at the place of destination. Such were the cases of *Smith v. Richardson*, (3 *Caines*, 219;) and *Medbury v. The N. Y. and Erie Railroad Co.* (26 *Barb.* 564.)

And where the goods are destroyed or lost in the foreign port, before the departure of the vessel, the rule of damages has been held to be the value at the place of shipment. (*Dusar v. Murgatroyd*, 1 *Wash. C. C. Rep.* 13.) But where the loss occurs after the vessel has left the place of shipment, then the value of the goods at the place of destination, deducting the charges, furnishes the true rule of damages. In *Watkinson v. Laughton*, (8 *John.* 213,) damages were given for the value of the goods at the place of destination, deducting the charges. (See *Van Winkle v. U. S. Mail Steamship Co.* 37 *Barb.* 122.) There is nothing in the evidence to warrant the conclusion that the loss occurred in port, before the vessel sailed. On the contrary, the port warden testified that the casks were properly stowed and well dunnaged; that there was no undue pressure on them; and that he thought the injury had been caused after the vessel had sailed. The weight of evidence is against the supposition that the loss had occurred in port.

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If it was a matter of doubt whether the loss occurred before, or after, leaving port, it became a question for the jury to pass upon; and the evidence of value at the place of destination was material, if the jury found the injury to have occurred after sailing.

The judge erred in excluding the evidence of value in the port of destination.

A new trial should be granted; costs to abide the event.

MULLIN, J. The jury did not allow the plaintiff the full amount of freight claimed and proved by him. They must therefore have deducted the value of the wine lost from the casks after it was put on board the plaintiff's vessel at Bordeaux. The court admitted evidence of the value of the wine at Bordeaux, and rejected evidence of its value at New York, the port of delivery. In this I think the learned judge erred. It seems to be well settled that when the loss of cargo occurs at the port where it is laden, and before the voyage begins, the carrier is liable for its value at such port. But when the loss happens after the voyage has been begun, then the value must be estimated at the port of delivery.

There is no evidence that the loss in this case occurred before the beginning of the voyage; and in the absence of any finding upon the point, I do not think it can be inferred, from the facts proven.

In estimating the value of the wine in question, at New York, it is not intended to give to the defendant the value of the wine after the duties or any other charges are paid on it. The value to which the defendant was entitled, was what the wine was worth on board ship in the port of New York, less the freight on the same from Bordeaux.

I have not seen a report of the case referred to by the learned judge in his opinion, and I cannot say whether the judge has given all the material facts of it. But as stated,

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it seems in conflict with reported adjudications, and a departure from a well settled rule of law.

I think the judgment should be reversed, and a new trial ordered ; costs to abide the event.

CLERKE, J. concurred.

[NEW YORK GENERAL TERM, November 5, 1866. *Ingraham, Clarke and Mullin*, Justices.]

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## AYRES vs. THE WESTERN RAILROAD CORPORATION.

An action commenced in the Supreme Court, by one foreign corporation against another, cannot be removed for trial, into the Circuit Court of the United States, under the Act of Congress of 1789.

But where the assignee of a foreign corporation, suing another foreign corporation, is a citizen of this state, the action may be removed, provided the claim is of such a nature [that the United States court can take cognizance of it.

The 17th section of the Act of Congress, which provides that the Circuit Courts of the United States shall not "have cognizance of any suit to recover the contents of any promissory note or other *chose in action* in favor of an assignee, unless a suit might have been prosecuted in such court, to recover the said contents, if no assignment had been made," applies to a claim against a railroad company, as a common carrier, to recover the value of goods entrusted to it for transportation ; such a claim being a *chose in action*. GEO. G. BARNARD, J. dissented.

Where a defendant applies for, and obtains, an order from the court giving him time to answer, and serves that order, with a notice signed by an attorney, as "attorney for the defendant," this is doing an act in the progress of the cause, and submitting to the jurisdiction of the court ; which is equivalent to an appearance.

The decision in *Stevens v. The Phoenix Ins. Co.* (24 How. Pr. 517,) questioned. Per BARNARD, J.

THIS is an appeal by the plaintiff from an order made by Mr. Justice BARNARD, removing this cause for trial to the circuit court of the United States for the southern district of New York. The action was brought by the plaintiff,

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a citizen of New York, in the supreme court, as the assignee of the Southworth Manufacturing Company, a Massachusetts corporation, to recover the value of certain property, delivered in 1861, by the Southworth company, at Springfield, in Massachusetts, to the defendant, for transportation as a common carrier, to consignees in a western state. The goods thus delivered were, in fact, destroyed by fire by the burning of the defendants' depot at East Albany, in July, 1861, and were of the value of more than \$500. The defendant is a railroad corporation created under the laws of Massachusetts, and is a common carrier, and the action is the usual one against a common carrier for the loss of goods. The defendant, claiming to be a citizen of Massachusetts, made application under the act of congress for the removal of the cause for trial to the circuit court of the United States, and the order was granted. Among other things it was shown that the defendant was the lessee under a perpetual lease, and operated the Albany and West Stockbridge Railroad Company, a New York corporation, having a railroad between Albany and the Massachusetts line, and for this reason, it was claimed that the defendant had lost the right of removing the cause into the federal court.

After service of the summons and complaint, the defendant, upon an affidavit made by C. W. Reynolds, in which he swore that he had been retained as the attorney of the defendant, in this cause, applied to a justice of this court, at chambers, for, and obtained an order, dated June 25, 1866, extending the time for putting in an answer, twenty days. A copy of this order was served upon the plaintiff's attorneys, with a notice thereof, signed "C. W. Reynolds, Deft's Att'y."

*Bliss & Cadwalader*, for the appellant.

*John H. Reynolds*, for the respondent. I. The authority for the removal of this case for trial to the circuit court of the United States, is given by the act of congress of 1789.

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(1 *Stat. at Large*, 79, § 19. *Brightly's Dig.* 128. *Conkling's Treatise*, 3d ed. pp. 123, 126, 173, 179, 475, 476, &c.)

II. The defendant, being a corporation created by and under the laws of Massachusetts, is a citizen of that state, and entitled to the same rights in respect to the right to the removal of a cause as a natural person. (*The Louisville, &c. R. R. Co. v. Latsen*, 2 *How. (U. S.) R.* 497, 554, 555, 558. *Rundle v. Del. and Raritan Canal Co.*, 4 *id.* 80. *Salmon Falls Man. Co. v. Goddard*, 14 *id.* 446. *Philadelphia, &c. R. R. Co. v. Derby*, *Id.* 468. *Marshall v. The Baltimore and Ohio R. R.*, 16 *id.* 314. *Dennistown v. N. Y. and N. H. R. R. Co.*, 1 *Hilton*, 62. *Conroe v. National Ins. Co.*, 10 *How. Pr. R.* 403, *per Bockes, J.* *People v. Utica Ins. Co.*, 15 *John.* 359. *Mott v. Hicks*, 1 *Cowen*, 573. *State of Indiana v. Woram*, 5 *Hill*, 33, 38. *Ontario Bank v. Bunnell*, 10 *Wend.* 186. *Sherwood v. Sar. and W. R. R.*, 15 *Barb.* 650. *Angell & Ames on Corporations*, § 467. *Whedan v. Camden and Amboy R. R. Co.*, *Philadelphia Legal Intelligencer*.) 1. The fact that the defendant transacts business in this state is of no importance. The right of removal depends upon citizenship, and a party cannot at the same time be a citizen of two states. 2. The case of *Stevens v. The Phoenix Ins. Co.* (24 *How. Pr. R.* 517,) does not apply to this, even if it was a sound decision. The application in that case was refused to a foreign insurance company, upon the ground that by appointing an agent under our statutes upon whom process might be served, it had waived the benefit of the act of congress. The correctness of this we deny. 3. But it will be seen that the general scope of the opinion favors a right of removal in a case like the present, save the intimation that a foreign corporation by sending its agents here and transacting business in this state may lose its citizenship in the state where created and to that extent acquire a residence here. This remark was wholly obiter, and was obviously made without due consideration and is against the reason of the thing and the adjudged cases. A

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corporation is by the law of its being doomed to reside within the jurisdiction creating it, and incapable of migrating.

III. It is said also that the plaintiff is an assignee, and for that reason there can be no removal. This objection rests upon the words of the 11th section of the act of 1789, (*Statutes at Large*, 78; *Brightly's Digest*, 12,) which is as follows: "Nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court, to recover the said contents if no assignment had been made." The answer to this objection is that this is not a suit to recover the contents of a promissory note or other chose in action, but to recover damages for the wrongful detention of property, and the statute does not apply. (*Deshler v. Dodge*, 16 How. 622. *Clark v. The City of Zanesville*, 4 Am. Law Reg. 501.)

INGRAHAM, J. The defendants are incorporated under the laws of Massachusetts. The plaintiff is a citizen of New York, and was assignee of a company incorporated under a law of Massachusetts. The defendants moved for an order to remove the cause into the United States Court. The motion was granted, and the plaintiff appealed.

It is clear that between the original parties, as both were corporations created by the laws of Massachusetts, this action could not have been removed. But inasmuch as the plaintiff, who is assignee of the claim, is a citizen of New York, the case is within the statute, unless the United States Court is prevented from taking cognizance of the action under the 17th section of the United States statute, which says the court shall not have cognizance of any suit to recover the contents of a promissory note, or other chose in action, in favor of an assignee, unless a suit might have been prosecuted if no assignment had been made. The question, then, arises, is this action brought to recover upon a chose in action? A chose

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in action, or a thing in action, is a term used in contradistinction to a chose, or thing, in possession, and is applicable to cases where the title to the money or property is in one person and the possession is in another, which, by contract, he is bound to deliver to the owner.

In *Campbell v. Perkins*, (8 N. Y. Rep. 430,) it was held, that a claim against common carriers, although in form for a wrong, was founded on contract. It was founded on an engagement, and is technically a claim. If so, then the claim is a chose in action transferred to the assignee, and bringing the case within the exception of the statute. It is similar in its nature to that of *Anderson v. The Manufacturers' Bank*, (14 Abb. Pr. R. 436.) That action was against the defendant for not protesting a note. The ground was negligence. So, here, the action is for not delivering goods according to agreement.

I think, also, there is good ground for holding that the defendant, by obtaining time to answer, by an order from the court, and serving that, with a notice signed by an attorney, as attorney for the defendant, did what was equivalent to an appearance. It was doing an act in the progress of the cause, and submitting to the jurisdiction of the state court, and was equivalent to an appearance. (*Cooley v. Lawrence*, 5 Duer, 610.)

The order should be reversed.

CLERKE, J. concurred.

GEO. G. BARNARD, J. (dissenting.) In order to bring this case within the principle of the case of *Anderson v. Manufacturers' Bank*, (14 Abb. 436,) it must be determined that this action is brought to recover the contents of a promissory note, or other chose, in action, and if this is its character, it was conceded on the argument that the defendant was not entitled to remove the cause for trial into the federal court. The action is brought against the defendant as a common

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carrier, for damages, on account of the non-delivery of goods delivered to it by the Southworth Manufacturing Co. at Springfield, in Massachusetts, for transportation to a western state. It is alleged in the complaint that the defendant has wholly failed and refused to transport or deliver the goods, on account of which the Southworth Manufacturing Co. sustained the damages claimed, and that the said Southworth Manufacturing Co. has duly sold, assigned and transferred to the plaintiff all its interest in said goods, wares and merchandize, and its claim, demands and cause of action, against the defendant.

It is thus obvious that the plaintiff is the vendee of the goods, to be transported, or of the claim to damages, after the defendant had violated its agreement to transport them, and had lost them, or converted them to its own use. This brings the case clearly within that of *Deshler v. Dodge*, (16 How. U. S. 622.) In that case, the suit was brought by the plaintiff, a citizen of New York, against the defendant, a citizen of Ohio, in replevin for a quantity of bank bills issued by banks in Ohio, and the plaintiff's title was derived by assignment from the Ohio banks. It was entirely clear that the assignors (the Ohio banks) could not have maintained any action against the defendant, for the recovery of the bills, for the reason that both the banks and the defendant were citizens of the same state, and the case was therefore in this aspect precisely like the present; and the only question to be determined was, whether it came within the provisions of the act of congress forbidding jurisdiction to the federal courts, in suits by an assignee to recover the contents of a promissory note, or other chose, in action.

It was held by the Supreme Court of the United States, that the circuit court had jurisdiction of the action. Mr. Justice NELSON, delivering the opinion of the court, says: (16 How. 631 :) "We are of opinion that the clause of the statute has no application to the case of a suit by the assignee of a chose in action, to recover possession of the thing in specie,

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or damages for its wrongful caption or detention, and that it applies only to cases in which the suit is brought to recover the contents, or to enforce the contract contained in the instrument assigned. In the case of a tortious taking or wrongful *detention* of a chose in action against the right or title of the assignee, the injury is one to the right of property in the thing, and it is therefore unimportant as it respects the derivation of the title ; it is sufficient if it belongs to the party bringing the suit, at the time of the injury.

The distinction as it respects the application of the 11th section of the judiciary act to a suit concerning a chose in action is this : where the suit is brought to enforce the contract, the assignee is disabled, unless it might have been brought in the court if no assignment had been made ; but if brought for a tortious taking or wrongful detention of the chattel, then the remedy accrues to the person who has the right of property or of possession at the time, the same as in a case of a like wrong in respect to any other sort of personal chattel."

It is difficult to see why this decision is not decisive of the present appeal, for it is entirely clear that this is an action to recover damages for the detention or non-delivery of personal property, and not for the recovery of the contents of a chose in action within the meaning of the act of congress. The plaintiff is not the assignee of the original contract for the transportation of the goods, but the assignee of the goods themselves and of the cause of action, arising from their conversion by the defendant or the refusal to deliver them on demand.

It is thus obvious that the plaintiff acquired no right by assignment until after the original contract had been broken, and the right thus acquired was to the goods *in specie* or to damages for their unlawful detention. Such an action, according to the decision of the Supreme Court of the United States, is not an action to recover the contents of a chose in action, and is not within the exception named in the act of

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congress. It may also be observed that actions against a common carrier, for the loss of goods, although sometimes said to be of an *amphibious* character, still belong to the class of actions *ex delicto*, and hence cannot be regarded as for the recovery of the contents of a chose in action, except upon the assumption that every right to recover damages, is in one sense a chose in action. It is very obvious that it was not intended to forbid jurisdiction to the federal courts in all cases of actions prosecuted by an assignee; for if such was the intention it would have been so declared. The true construction was given to the statute by Mr. Justice NELSON, in the opinion before referred to, and by that we must be guided.

It is also urged that because this action is prosecuted by an assignee, the circuit court of the United States has no jurisdiction. This assumes that no action by an assignee can be maintained in the federal courts, and the assumption is entirely unfounded. As before shown, an action to recover damages for the caption and detention of property, is not for the recovery of the contents of a chose in action, and not within the exception in the act of congress, and if not, there is no objection to the jurisdiction. The jurisdiction is forbidden only in specified cases, and it is enough to say that it is not one of them.

It is also said that if the right of removal is *doubtful*, the order should not be granted, and a suggestion of this kind was made in the case of *Anderson v. Manufacturers' Bank*, (14 Abb. Pr. 436.) If this case is not within the exception in the act of congress, there is no doubt of the right of removal. It is for the court to determine whether the defendant brings the case within the law, entitling it to have the action removed; and if this appears, the question is free from doubt. If, on the contrary, the case is not entitled to be transferred to the federal court, it is equally clear that the order should be refused. It is for the court to say which of these alternatives is presented, and when a conclusion is reached, all doubt is removed and the duty is plain.

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If upon the papers presented, the defendant is by law entitled to have the cause removed, the state court loses all jurisdiction, and all further proceedings in it are *coram non judice* and void, and the judgment pronounced will be reversed. (*Gordon v. Longest*, 16 *Peters*, 97.) And if the case is improperly removed, the circuit court will remand it to the state court, and if in such case the circuit court should improperly entertain jurisdiction, the Supreme Court will correct the error. (*Pollard v. Dwight*, 4 *Cranch*, 429.) It is thus perceived that if this court should improperly refuse to transfer a cause, its judgment in favor of the plaintiff will be ineffectual, and if it should improperly send a case for trial to the circuit court of the United States, that court will correct the error, and remand the case to us. It is thus apparent that in no event can the right of either party be ultimately lost; and this disposes of the objection made by the plaintiff's counsel on the argument, that if this cause should be improperly removed, the right of the plaintiff might be lost, by the running of the statute of limitations. For if the circuit court shall refuse to entertain jurisdiction of this case if transferred, it will be remanded, and no new action in this court need be commenced.

The objection that the petition for the removal was brought too late is not tenable. The summons and complaint were served on the 5th of June, 1866, and the time to answer would expire on the 25th. On that day, on an affidavit showing the intention of the defendant to apply for a removal of the cause to the federal court, a chamber order was obtained from a justice of this court extending the time to answer twenty days, which was duly served. This was not entering an appearance in the action; it was only a proceeding to prevent the entry of judgment to enable the defendant to comply with the act of congress and apply for a transfer of the cause. On the 5th of July, the appearance of the defendant was entered, by a special order, and on that day the petition and bond were filed. This must be regarded as suf-

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ficient ; for otherwise, under our practice, a defendant entitled to have his cause tried in the federal court would wholly lose the benefit of the provisions of the act of congress, if for any reason he was unable to file his petition within twenty days after he was served with a complaint. It would be strange if an extension of the time to answer for the very purpose of enabling a defendant to apply for a removal of the cause should be regarded as such a submission to the jurisdiction of the state court as will deprive him of the benefit secured by act of congress. It must be observed, also, that our practice has radically changed since the act of congress was passed, and it is not now entirely clear what, under the present system, is the "entering of an appearance in a state court." It certainly is not done by obtaining an order extending the time to answer, and perhaps there is no other way of complying with the provisions of the statute than was done in this case. At all events we regard it as sufficient.

The defendant is a corporation created by the laws of the state of Massachusetts, and is therefore a *citizen* of that state. This is now too well settled to be longer questioned, and it is not questioned in this case. It is said, however, that, because the defendant is the lessee of, and operates, a railroad organized under a law of this state, it does not come within the act of congress. The right of removal depends upon the *citizenship* of the parties, and not upon the extent of the business they transact in this state ; and it is not perceived how it can be said that a citizen of Massachusetts, doing business of any kind within this state, has waived his right to remove a cause to the federal court. Any such construction would nullify the act of congress. It is quite true that it has been decided at a special term, (24 *How. Pr.* 517,) that a foreign insurance company doing business in this state, and having appointed an agent under a special statute upon whom process might be served, lost the right to remove a cause to the courts of the United States. It is unnecessary to say whether this case was rightly decided or not, and there may

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be grave doubts as to its correctness. Yet the case is wholly unlike this; for here the defendant has waived nothing if coming into this state by its agents and doing business is not to be deemed a waiver of the right, secured by the act of congress, and clearly this is not so.

The order appealed from should be affirmed with \$10 costs.

Order reversed.

[NEW YORK GENERAL TERM, November 5, 1886. *Ingraham, Clerks and G. G. Barnard, Justices.*]

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FORD and others vs. CROCKER and others.

In an action against the owners of a ship, for goods furnished to the ship, on the order of the captain, the plaintiff must give some proof to show that the articles furnished were necessities.

The rule adopted in the courts of this country, while it admits the right to confine the supplies thus furnished to such as are necessary, leaves the decision as to what is necessary rather to the captain than to the creditor.

Tradesmen are not called upon, before delivering supplies for a vessel on the order of the captain, to examine whether each article ordered is actually necessary to enable the vessel to make the voyage. If it is proper that they should be ordered on account of, and for the use of, the vessel, the vendors may rely on the captain to decide whether they are necessary or not; and his order for the goods on that account is sufficient.

In the absence of any proof that any part of the plaintiff's account was furnished for the private use of the captain, evidence that the supplies were ordered by the captain for the use and on account of the vessel, and that they were furnished, is *prima facie* sufficient to charge the owners.

THIS action was brought against the defendants, as owners of the American ship *Forrest*, for goods furnished to the ship, and money paid for premiums of insurance, in London, on the order of the captain. Upon the trial, no direct proof was given that the articles furnished were necessities, and the defendant requested the judge to charge the jury that in such a case it was incumbent on the plaintiff to prove that

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the articles furnished on such order were necessities ; and when the fact as to said articles being necessary was put in issue, the burden of proof was on the plaintiffs. The judge refused so to charge, and added : " Express proof is not requisite that the supplies were necessary. It may be inferred from the whole circumstances of the case." To this the defendant excepted, and the jury having found a verdict in favor of the plaintiffs, the defendants appealed from the judgment entered thereon.

*G. Dean*, for the appellants.

*D. D. Lord*, for the respondents.

*By the Court*, INGRAHAM, J. I think there can be no doubt that under the decisions of the English courts, it is necessary to give some proof on the part of the plaintiff to show that the articles furnished were necessities. The rule is stated by *Abbott*, when referring to *Thacker v. Moates*, (1 *M. & Rob.* 79,) to be that the creditor is required to prove the actual existence of the necessity for those things which give rise to the demand. The authority of the master is to provide necessities. If, therefore, a person trust him for a thing not necessary, he trusts him for that which is not within the scope of his authority to provide, and consequently has no right to call on his principal for payment." (*Rocher v. Busher*, 1 *Stark.* 27. *Palmer v. Gooch*, 2 *id.* 428.)

So it is said by Dr. Lushington, in the case of *The Alexander* (1 *W. Rob. Adm.* 361,) and *The Sophie*, (*Id.* 369 :) " I cannot find any case in our own law which does not require that the proof that the articles furnished were necessary, should come from the plaintiff, to the extent of showing that they were what a reasonable and prudent owner would have ordered. There must be some evidence ; and the doctrine that casts the *onus probandi* on the tradesman or material-man who provided the articles, is founded on great and im-

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portant principles, and is wisely framed to prevent great abuses." (See also *Beldon v. Campbell*, 6 Eng. L. and Eq. 473.)

But while there must be sufficient to warrant the inference that the articles furnished were necessary, still it is not to be understood that the creditor is to inquire whether every article ordered by the master is absolutely necessary. He must believe that he is furnishing what is necessary. Of this it is the master's duty to judge; while the creditor may not have it in his power to form an opinion. (See case of *The Sophie*, 1 W. Rob. 369.)

The latter rule is more properly applicable to cases of articles required for daily use on board of a vessel, which it is within the particular province of the master to order, and which he can best decide to be necessary and proper.

None of the cases seem to decide what evidence a creditor is to require, as to necessaries, before furnishing them; and in the case of articles to be used on board of the ship. I should think the declaration of the master that he wanted articles for use on board of the vessel, and the fact that such were taken on board, would be enough to warrant the inference of their being necessary. A ship that carries passengers would need many articles which would not be needed for the crew. A different class of stores would have to be provided in the one case from the other; and the creditor in such case must depend on the orders of the captain, with his declarations that the articles purchased are required on board of his vessel.

In the courts of this country, a rule has been adopted, not so strict as the English, and while it admits the right to confine the supplies to such as are necessary, it leaves the decision as to what is necessary, rather to the captain than the creditor. In *Provost v. Patchin*, (9 N. Y. Rep. 235,) it is said: "The general doctrine seems to be fully recognized, in the books, that where labor by way of repairs is performed upon a ship, or supplies furnished, the presumption is that it was done and furnished for the benefit and at the request

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of the owners." (11 *Mass. R.* 40. 3 *Barb.* 201.) And where the captain told the storekeeper that the supplies were needed for the vessel, the owners were held liable. (*Kenzel v. Kirk*, 37 *Barb.* 113. *S. C.* 21 *How. Pr.* 184.) The evidence of Goldsmith shows that the articles supplied to the vessel were so furnished by the order of the captain on behalf of the owners. Curtis, one of the plaintiffs, testifies to the same fact.

It does not appear that the defendants objected that the greater part of the account was not for necessities, but only that a small portion of the account, amounting to about £18, was not for necessities. I do not think, under the evidence in this case, that the plaintiffs, before delivering a bill of goods such as these were, was called upon to examine whether each article ordered was actually necessary to enable the vessel to make the voyage. It was proper that they should be ordered on account of, and for the use of, the vessel. Beyond that the sellers could rely on the captain to decide whether they were necessary or not; and his order for the goods on that account was sufficient.

The judge left to the jury the question whether any part of the account was furnished for the private use of the captain, and if so, instructed the jury that the owners were not liable. The defendants had examined the captain as a witness; and if there was any doubt on this point they could have examined him in relation thereto, but did not. In the absence of such proof, the evidence is *prima facie* sufficient to charge the owners.

The judgment should be affirmed.

[NEW YORK GENERAL TERM, November 5, 1866. *Geo. G. Barnard*, *Clerks*, and *Ingraham*, *Justices*.]

## REYNOLDS vs. FISHER.\*

Section 236 of the Code does not authorize the examination of a person who, on being applied to by the sheriff, does not *refuse* to give the certificate therein mentioned, but gives the only certificate that he can give, viz. that the defendant in the attachment suit has an interest, as a special partner, in his firm, the amount of which will depend on the liquidation of the affairs of the partnership.

That section allows an examination only when the party applied to by the sheriff refuses to give the certificate.

**A** PPEAL from an order made at a special term denying a motion to vacate an *ex parte* order for the examination of George D. Bayard, under section 236 of the Code.

*By the Court*, INGRAHAM, J. The sheriff had an attachment against the defendant. He served a copy on George D. Bayard, and required him to serve on the sheriff a certificate of all property and effects, rights, and shares of stock, and debts and credits of said defendant, then in his possession or under his control, and particularly the interest of the defendant, as special partner or otherwise, in the firm of George D. Bayard, &c. A certificate was served on the sheriff, by Bayard, stating that he had not any property, of any description, of Fisher's, in his hands or under his control, excepting his interest in the limited partnership of George D. Bayard, the amount of which would depend on the liquidation of the affairs of the partnership. Upon receiving this certificate, the plaintiff obtained, *ex parte*, an order for the examination of Bayard under section 236 of the Code. Bayard thereupon made a motion to have such order vacated, which motion was denied, and an appeal was taken from the decision.

It appears to me, that the statute did not authorize the order for the examination of Bayard. He did not refuse to give the certificate, but gave the only certificate that he could give, viz: that the defendant had an interest as a special partner in his firm, the amount of which would depend on the liquidation of the firm. Neither the defendant, nor the sheriff,

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could touch the property of the firm, or any interest which the defendant had in it. All the property was under the sole control of the general partners, and applicable to the purposes of the firm, during its existence, and to the payment of the debts of the firm, in the first instance. The sheriff could not close up the firm, or in any manner interfere with it. Nor were the partners bound to disclose the state of the affairs, in such a certificate. They gave all the notice the law required of an interest in the firm, unsettled and unknown. The plaintiffs could not need information as to the amount of the interest, because they had a copy of the articles of partnership.

But, independent of the question whether the sheriff could in any manner interfere with the partnership, or its property, the certificate which was given was sufficient, and precluded any further examination. The 236th section of the Code, which authorizes an examination, only allows it when the party served with the attachment refuses to give the certificate. This has been construed as not only refusing to give the certificate, but as applicable where the party served says he has no property whatever; and these are the only cases in which an examination has been held proper.

In *Carroll v. Finley*, (26 Barb. 61,) the general term of this district held that an examination could only be where the party sought to be examined refused to give a certificate, or where it appeared he had given a false one. A similar decision was made by the general term of this district, in *Howell v. Koppel*, November general term, 1861.

The order in this case was improvidently granted, and should be vacated.

[NEW YORK GENERAL TERM, November 5, 1866. Geo. G. Barnard, Clerks and Ingraham, Justices.]

GAWTRY and others *vs.* DOANE.

Where an indorser, though denying notice of protest, in a sworn answer, fails to annex the affidavit required by statute, (3 R. S. 5th ed. 474, § 85,) a notarial certificate of protest may be received in evidence, and is presumptive evidence of the facts stated therein.

But the defendant may contradict the presumption arising from the certificate, by showing that it is untrue.

Where the demand of payment is not made by the notary himself, but his certificate is founded on an entry made by his clerk, the act of the clerk is not to be deemed the act of the notary, but may be proven as the act of an individual, and is subject to the ordinary rules of evidence.

Where the clerk who made the demand and gave notice to the indorsers in the name of the notary, is dead, memoranda made by him and entered in the register of the notary, are admissible in evidence, to prove demand and notice.

If there has been no due presentment of a notice, or notice of dishonor, and the indorser, after the maturity of the note, supposing himself liable to pay the same, takes security from the maker, that will not amount to a waiver of the objection of want of due presentment of notice.

An admission of liability, by an indorser, after maturity, is never held to be sufficient to overcome the want of demand and notice, without proof that, at the time of the admission, the indorser knew that there was such defective protest.

In the absence of any such proof, although such an admission is not sufficient to establish the liability of the indorser, it is admissible as evidence in connection with the other proof, to be submitted to the jury, upon the question of notice.

**T**HIS action was brought against the defendant as indorser of a promissory note made by Townsend & Gray, dated March 9, 1857, for \$200, payable three months after date, to the order of the defendant, and indorsed by him for the accommodation of the makers. The complaint, after alleging the making and indorsement of the note, demand and notice of non-payment, and that the plaintiffs were the lawful owners and holders of the note, alleged that the defendant, being indorser of said note, did, on or about the 19th day of June, 1857, take judgment by confession against said Charles E. Townsend and Gerald Gray, (the makers of said note) in the Supreme Court, city and county of New York, for \$2106.12 costs and disbursements, on account of

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his liability as indorser of five certain promissory notes made by said defendants, Townsend & Gray, payable to the order of said Doane, and by him indorsed and transferred to third parties for a good and valuable consideration; that at the time said Doane took said judgment against said Townsend & Gray, the note on which this action is brought had been due and unpaid seven days, and the said Doane had been duly notified and charged as indorser thereof, previous to his taking said judgment against said Townsend & Gray; that the note on which this action is brought, was one of the five notes mentioned in said judgment by confession, and to secure himself as indorser of said note with other notes, said judgment was taken by said Doane against said Townsend & Gray; that said Doane at that time resided in Putnam county, New York state, within two days' communication by mail of the city of New York; that the said five notes amounted, in the aggregate, to \$2100; that said Doane retained his said judgment for \$2106.12 against said Townsend & Gray, and afterwards, to wit, on or about the 19th day of June, 1857, he issued execution upon said judgment against said Townsend & Gray, and levied upon the property of said defendants, Townsend & Gray, and took sufficient property belonging to said defendants, Townsend & Gray, to indemnify him, said Augustus Doane, the amount of said judgment, \$2106.12, and that he retained his levy on said property to secure himself as indorser of said notes in said confession of judgment mentioned; the note on which this action is brought being one of said notes, and afterwards sold said property so levied on by him by virtue of said execution, and took and retained the proceeds of the sale of said property of Townsend & Gray, and applied the same to his own use and benefit. That said defendant, Doane, took proceedings at law in June, 1857, against said Townsend & Gray, and against said Charles E. Townsend individually, and obtained several judgments against said Charles E. Townsend and Gerald Gray, composing the firm of Townsend & Gray, and against said Charles

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E. Townsend individually, and issued executions upon said judgments, and by virtue thereof possessed himself of all the property of said firm and the property of said Townsend individually, and sold the same and applied the same to his own use and benefit; and said Doane secured himself, as far as any property of said defendants, Charles E. Townsend and Gerald Gray, composing said firm of Townsend & Gray, and the individual property of said Townsend, might avail to save him, said Doane, harmless, and that said Doane protected himself as fully as any and all property of said defendants, Townsend & Gray, or that of either of them, might avail for the payment of the debts and liabilities of said Townsend & Gray, or the debts and liabilities of either of them, or for payment of any indorsement made by said Doane of any notes made by said Townsend & Gray.

The defendant, by his answer, admitted the making and indorsement of the note, but alleged that notice of demand and non-payment was not given to him; that the note was indorsed by him for the accommodation of said Townsend & Gray, and was never transferred by the defendant to third parties for a good and valuable consideration or otherwise. The defendant further alleged, on information and belief, that the said Townsend & Gray at, or about the time alleged in the complaint, confessed a judgment to this defendant to secure him against his contingent liability upon said note and other notes which had been indorsed by him for the accommodation of said Townsend & Gray, but he denied that at the time of the confession of said judgment, or prior thereto, or at any other time, this defendant had been duly or in any way notified, and charged as indorser of said note; and he denied that any notice had ever, at any time, been given him, of the demand and non-payment of said note, and he denied that he transferred said note to third parties for a good or valuable consideration, or otherwise. He further alleged, on information and belief, that at or about the time alleged in the complaint, an execution was issued upon such judgment,

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and a levy thereunder made upon the property of said Townsend & Gray, but as to the value of the property so levied on, this defendant had no knowledge or information sufficient to form a belief. And he denied that he retained his levy upon said property to secure him as indorser of said notes in said confession of judgment mentioned, or either of them, or that he retained said levy for any purpose whatever; and he denied that he afterwards sold said property so levied on, or caused the same to be sold; and denied that he in any way took or retained the proceeds of the alleged sale of said property, or in any way applied the same to his own use and benefit. And he denied that he ever received or realized upon said judgment or execution, or in any way whatever, any sum of money whatever, from said Townsend & Gray, or either of them, for any purpose whatever. He alleged that he was restrained by an injunction order of this court from the sale of said property so levied on as aforesaid, issued in an action in this court, brought by certain creditors of said Townsend & Gray against said Townsend & Gray and this defendant, and by virtue of a judgment therein obtained said property was sold by a receiver appointed by this court, and the proceeds thereof applied to the payment of other claims against said Townsend & Gray. He denied that he took any proceedings at law other than that above mentioned in June, 1857, or at any other time, against said Townsend & Gray, and against said Townsend individually, or obtained several or any judgment or judgments against them as a firm, or either of them individually, or issued any execution upon any such alleged judgment or judgments, or by virtue thereof, or otherwise possessed himself of all or any of the property of said firm, or of the property of said Townsend individually, or sold or applied the property of said firm, or of said Townsend individually, to his own use and benefit. And he denied that he secured or saved himself harmless out of any property of said firm, or out of the individual property of either individual member thereof. And denied that he

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protected himself out of the property of said Townsend & Gray, or out of the individual property of either of them, for any debts or liabilities of said Townsend & Gray to him, or the debts and liabilities of either of them to him, or for the payment of any indorsement made by the defendant of notes made by said Townsend & Gray, as stated in said complaint. All the other allegations of the complaint were denied.

On the trial, the plaintiffs, after reading the note and indorsement in evidence, offered in evidence the certificate of J. H. Platt, notary public, attached to said note, as presumptive evidence of the presentment of said note for payment. To which evidence counsel for the defendant objected, on the grounds: 1st. That the sworn answer of the defendant Doane, denying the receipt of notice of demand, and non-payment of said note, was an affidavit within the meaning of the statute, and that, therefore, the certificate of said notary was not presumptive evidence of the facts therein contained. 2d. That (if the sworn answer was not an affidavit, within the meaning of the statute,) an affidavit had been made and served upon the plaintiff's attorney, by mail, in January, 1864; that issue was joined 14th April, 1863, and the cause was placed upon the calendar in October, 1863, and noticed for trial, by both parties, for January, 1864, before the affidavit was sent, which was not annexed to the answer, and did not refer to it in any way. Which statement being taken as true, the court decided that the defendant Doane had not complied with the statute in respect to annexing the affidavit to the answer, and the certificate was presumptive evidence of facts therein stated, especially as the defendant's answer contained the statement that notice of demand and non-payment of said note was not given to him, and the notary's certificate was, that the note was duly presented for payment, and payment demanded, and not that notice was given to the defendant. The objections were overruled by the court, and the defendant excepted to such decision.

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The said certificate was then read in evidence. It was proved that the notary did not present the note himself, but gave it to a clerk of his, James C. Parker, jr. who was deceased at the time of the trial. The plaintiff then gave in evidence, under objections, certain memoranda made by said Parker, and entered in the register of said notary, to prove the presentment of said note. A witness of the plaintiff, John H. Carmers, testified, that on the 13th day of June he sent, by mail, to the defendant, a notice of the non-payment of said note, addressed to him at Brewster's, Putnam county, N. Y. The residence of the defendant was Dykeman's Station, Putnam county, N. Y., and his post office address, at which post office there is a daily mail. Notice of non-payment of all the other notes mentioned in the confession of judgment was received by the defendant at Dykeman's Station. Charles E. Townsend, one of the makers of the note, was inquired of, at the time the note was passed to the plaintiffs, as to the post office address of Doane, and gave them his address, Dykeman Station, Putnam county, N. Y. The witness Charles E. Townsend, one of the makers of said note, testified also that said note was never presented to him for payment, and that he never saw the note after it was passed away till a few weeks before the trial.

The plaintiffs' counsel offered in evidence a certified copy of a judgment record by confession, in the Supreme Court, in the case of Augustus S. Doane against Charles E. Townsend and Gerald Gray, dated June 18, 1857. To which the counsel for defendant Doane objected, as irrelevant and immaterial, and as being no evidence of any demand and notice, and because the statement was one made by Townsend & Gray, and the defendant Doane was not bound by, nor was the same evidence against him. The plaintiffs' counsel stated to the court that, though the confession of judgment was sworn to by Townsend & Gray, he should show, on the trial, that Doane had accepted of this confession, and adopted the

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statements therein as true, and had issued execution thereon for the full amount of such judgment, and kept his levy for over a year, and had further, in an answer sworn to by him in a suit in this court, wherein Clark and West were plaintiffs, and Townsend, Gray and Doane, defendants, and wherein this judgment was impeached as fraudulent and false, sworn, in August, 1857, that that confession was true in every respect; and the plaintiffs' counsel contended that such confession of judgment, under the circumstances, was evidence that Doane was liable, as indorser of the note for \$200 then past due by six days, when he took the confession of judgment. The court, thereupon, determined to receive the same as evidence, and the defendant excepted. The judgment was then read in evidence. The plaintiffs' counsel offered in evidence the judgment roll in the case of Clark & West against Doane, Townsend & Gray, in the Supreme Court, setting aside the said judgment confessed by Townsend & Gray to Doane. To which the defendant Doane objected as irrelevant. The objection was overruled, and the defendant Doane excepted. The said record was then read in evidence.

The testimony being closed, the counsel for the defendant moved to dismiss the complaint on the grounds :

1st. There was no evidence of the presentment and demand of payment of said note, and refusal to pay the same.

2d. That no notice of demand and non-payment of said note was served on or given to the defendant. Which motion was denied, and the defendant excepted.

The jury rendered a verdict for the plaintiffs, for \$297.23. A motion for a new trial was denied, and from the order denying a new trial, and from the judgment, the defendant appealed.

*Close & Robertson*, for the appellant.

*J. R. Hill*, for the respondents.

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*By the Court*, INGRAHAM, J. The notarial certificate of protest was properly received in evidence. The defendant did not annex to his answer the affidavit required by statute, (a) and the notarial certificate became presumptive evidence of the facts stated therein. (*Lansing v. Coley*, 13 Abb. Pr. 272.) The defendant then was at liberty to contradict the presumption arising from the certificate, by showing that it was untrue. This he attempts to do by proving that the demand of payment was not made by the notary, but that the certificate was founded on an entry made by his clerk. When such a mode is resorted to, for protesting a note, the act of the clerk is not the act of the notary, but may be proven as the act of an individual, and becomes subject to the ordinary rules of evidence, (*Onondaga County Bank v. Bates*, 3 Hill, 53;) where Nelson, Ch. J. denied the authority of the notary to give the certificate on the acts of a clerk, and sustained the rejection of it as evidence.

This renders it necessary that there should be evidence of the acts of the clerk; and the plaintiff offered the entry of the clerk in evidence, after proof of his death. In *Nichols & Luce v. Goldsmith*, (7 Wend. 160,) it was held that the memorandum of a deceased cashier who notified indorsers in the name of a notary, was sufficient evidence to charge the indorser. (*Welsh v. Barrett*, 15 Mass. R. 380. *Halliday v. Martinet*, 20 John. 172.) This entry of the deceased clerk was properly admitted.

The plaintiff relies, also, upon the acceptance by the defendant, from the maker of the note, of a judgment to secure them for this note and others for which Doane was said to be liable. In the suit of *Clark & West v. Doane and others*,

(a) By the Revised Statutes, (3 R. S. 5th ed. 474, § 85,) it is provided that the certificate of a notary of the presentment of any note for payment, and of any protest of such note for non-payment, and of the service of notice thereof on any or all of the parties to such bill or note, shall be presumptive evidence of the facts contained in such certificate. But this section does not apply to a case where the defendant annexes to his answer an affidavit denying the fact of having received notice of non-acceptance or of non-payment.

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brought to set aside such judgment, Doane put in an answer, alleging that he was liable on the note, as indorser, and claiming to maintain his judgment on that ground. The evidence was submitted to the jury to show that Doane was liable as indorser. It has been held that taking security from the maker operates as a waiver of demand and notice, when taken before maturity of the paper. (*Otsego County Bank v. Warren*, 18 Barb. 290.) Also, that taking an assignment of all the property of the debtor renders demand and notice unnecessary. (*Seacord v. Miller*, 13 N. Y. Rep. 55.) This point was examined by Bacon, J. in *The Otsego County Bank v. Warren*, *supra*, and he held "If there has been no due presentment, or notice of dishonor, and the indorser, after the maturity of the note, supposing himself liable to pay the same, takes security from the maker, that will not amount to a waiver of the objection of want of due presentment and notice," citing *Bond v. Farnham*, (5 Mass. R. 170 ;) *Tower v. Durell*, 9 id. 332 ;) *Richter v. Selignan*, (8 S. & R. 425 ;) *Story on Prom. Notes*, (§§ 278, 282.) I am inclined to concur in this ruling. An admission of liability, by an indorser, after maturity, is never held to be sufficient to overcome the want of demand and notice, without proof that at the time of the admission the indorser knew that there was such defective protest. In the present case there was no proof of such knowledge. But, although it would not have been sufficient to establish such liability, it was admissible as evidence in connection with the other proof, to be submitted to the jury upon the question of notice.

The judgment should be affirmed.

[NEW YORK GENERAL TERM, November 5, 1866. *George G. Barnard*, Clerk and *Ingraham*, Justices.]

**THE PEOPLE, *ex rel.* The United States and Brazil Steamship Company, *vs.* THE COMMISSIONERS OF TAXES AND ASSESSMENTS FOR THE CITY AND COUNTY OF NEW YORK.**

A steamship company, incorporated under the laws of New York, for the transportation of passengers and freight between New York and Brazil, whose capital is invested in vessels employed for that purpose, and whose office is located in the city of New York, is not exempted from state taxation on its capital, under the constitution of the United States, on the ground that the whole amount is invested in steamships engaged in foreign commerce and in carrying the mails under a contract with the United States. Such an assessment in no way interferes with the power of congress to regulate commerce, either with foreign countries or between the states.

THE relators were incorporated under a statute of the state of New York, for the transportation of passengers and of freight between New York and Brazil. The capital of the company is invested in steamships employed for this purpose. The office of the company was located in the city of New York. The tax commissioners assessed the relators on the whole amount of their capital stock. The relators claimed to be exempt from taxation on their capital, because the whole amount was invested in steamships engaged in foreign commerce, and in carrying the mails under contract with the United States. The case was brought before the court on a certiorari to review the assessment.

*C. A. Rapello*, for the relators. I. The capital of the relators consisting wholly of its steamships, a state tax cannot legally be assessed upon such capital if the ships themselves are exempt from state taxation. (*Bank of Commerce Tax*, 2 Black, 260. *Bank Tax Case*, 2 Wallace, 200, 210.)

II. The ships of the relators are exempt from state taxation. 1st. Because they are employed in foreign commerce. 2d. Because they are employed by the government of the United States in transporting the mails. 3d. By reason of the provision of the constitution of the U. S. (*Art. 1, §10, subd. 2*.) which prohibits the states from laying any duty on tonnage. 4th. By reason of the provision of the constitution

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of the U. S. (*Art. 1, § 9, subd. 5*), which declares that no preference shall be given by any regulations of commerce or revenue to the ports of one state over those of another.

III. The exemption claimed by reason of the ships being employed in foreign commerce rests upon the provision of the constitution giving to congress the power to regulate commerce with foreign nations, etc.

(a.) This power is *exclusively* vested in congress ; consequently no state legislature can operate upon that subject. (*Gibbons v. Ogden*, 9 *Wheat.* 198. *Brown v. State of Maryland*, 12 *id.* 419. *Passenger cases*, 7 *How.* 400, 411.)

(b.) The taxation of the instruments employed in foreign commerce is a regulation of commerce. (*The People v. Brooks*, 4 *Denio*, 476.) "Passengers, as was said in the case of the *City of New York v. Miln*, (11 *Peters*, 136,) are not the subject of commerce, nor are they like the officers and crew of a vessel, indispensable agents of navigation. A tax on the former may not therefore be in any sense a regulation of commerce, although a law imposing a similar burthen on the officers and crew might well be regarded as of that character." (4 *Denio*, 476.) "The word 'commerce,' as used in this connection, includes navigation, and embraces ships and vessels as the instruments of intercourse and trade, as well as the officers and seamen who navigate and control them. The power of regulation vested in congress extends to all these subjects." (*Id.* *Gibbons v. Ogden*, 9 *Wheat.* 189 *et seq.*) In "the passenger cases," subsequently decided, (7 *How.* 283,) it was held that a state tax on passengers was equally invalid with a tax on officers and crews of vessels engaged in foreign trade ; and notwithstanding the dicta of some of the judges to the contrary, the reasoning by which this decision is supported shows that a tax on the vessel itself, whether owned by a citizen of the state or not, would be equally invalid. That such is the effect of the decision is conceded by Chief Justice Taney, who delivered a dissenting opinion in that case. Mr. Justice Wayne, at page 412, states the conclu-

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sions on which the majority of the court agree, among which are: 2. That the states of the Union cannot tax the commerce of the United States. (*P.* 414.) That the power in congress to regulate commerce, &c. includes navigation upon the high seas, and that any tax by a state in any way affecting the right of navigation, or subjecting the exercise of the right to a condition, is contrary to the aforesaid grant. In the opinion of Mr. Justice Catron, the objection to the law is placed upon the distinct ground that it imposes taxes on vessels through their masters, (*see pp.* 444, 445;) and at page 446 he says: "If the first part of the law is void because it lays a duty upon the vessel," &c. And at p. 447: "If the state taxes the vessel directly by a tonnage duty, or indirectly by taxing the master and crew, &c. &c. she assumes to exercise the jurisdiction of congress, and to regulate navigation engaged in foreign commerce." Mr. Justice Grier takes the same view; and although he confines his remarks to vessels not owned by the citizens of the state, his reasoning is equally applicable to vessels owned by citizens. (*See pages* 458, 459.) The law was held unconstitutional as to all vessels. (*Page* 412.) If the states can lay any tax upon vessels employed in foreign commerce, the power is unlimited. The states can tax them to any extent, even to destruction, and may drive the commerce of the country from the ocean. "The power to tax involves the power to destroy." (*Per Ch. J. Marshall in McCulloch v. The State of Maryland, 4 Wheat.* 316.)

(c.) The power of imposing taxes upon such vessels, if it exists, being unlimited, can be exercised by the states in any form and to any extent; and may be used in direct hostility to the policy of congress in those regulations of commerce which relate to the impositions upon ships and vessels, and make discriminations between vessels based upon the nationality of their crews, &c. place of building vessels, &c. (*See acts concerning navigation collected in Brightly's Digest, p.* 651, &c.; *Act of 20th July, 1790; Act of March 1,*

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1817; *Act of May 31, 1830.*) If the states have power to impose taxes on such vessels they may nullify all these discriminating regulations. Any tax not based upon the same discriminations does nullify them *pro tanto*. "The power of a state to tax cannot be used to obstruct or defeat the power of congress to regulate commerce." (12 *Wheat.* 463, 448, 449.)

IV. The vessels in question, being employed by the government in carrying the mails, are, for that reason exempt from taxation. The states cannot tax those means which are employed by the government of the United States in carrying out the powers vested in it by the constitution. (*Weston v. City of Charleston*, 2 *Peters*, 467. *Bank of Commerce case*, 2 *Black*, 260. *McCullough v. State of Maryland*, 4 *Wheat.* 425. *Osborn v. Bank of U. S.*, 9 *Wheat.* 738.)

V. The provisions of the constitution of the United States which prohibits the states from laying any duty on tonnage, prohibits them from laying any tax which shall have the same effect. The tax upon the value of the vessel is as objectionable as if it were measured by her tonnage. "It is, in fact, a duty on the vessel, not measured by her tonnage, it is true, but producing a like result by merely changing the ratio." (*Opinion of Grier, J.*, 7 *How.* 458.) It is true that the learned judge speaks subsequently of vessels not owned by citizens of the state, but there is no distinction in this respect admissible. A state has no more power to lay duties on domestic than on foreign vessels.

VI. The provisions of subdivision 5, § 9, article 1 of the constitution, show that it was intended that the ports of one state should have no advantages over those of another. The ships belonging to New York have the right to be put upon an equal footing with those of the other ports of the United States. But if they are subjected to the enormous taxes imposed upon the inhabitants of this city, it is evident that they cannot compete on equal terms with foreign vessels, or those owned out of the port of New York and not subject to

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a like amount of taxation. All the discriminations made by congress in the laws respecting tonnage, for the purpose of favoring domestic vessels, or vessels manned by American crews, are rendered entirely futile, and by means of state taxation greater burthens are cast upon domestic vessels than upon foreign vessels, which are exempted from state taxation. This is even a greater mischief than it would be to allow the states to impose tonnage duties on all vessels, domestic and foreign.

*Richard O'Gorman*, for the respondents. 1. The relators are not entitled to the exemption claimed. (a.) The power of taxation is a sovereign power, and is as necessary to the existence of the states and the due administration of their government as it is essential to the existence and administration of the national government. Accordingly, this power of taxation has ever been recognized as residing concurrently in the state and national governments, and without other limitations in either than those imposed by the national constitution, and those arising from the structure of the government. (*Gibbons v. Ogden*, 9 *Wheaton*, 199. *McCulloch v. State of Maryland*, 4 *Wheaton*, 431.) The only express constitutional limitation upon the taxing power of the states is that in which they are prohibited from laying any imposts or duties on imports or exports. (*Const. art. 1, § 10, subdivision 2.*) The other limitations upon this power arise from the complex system of the federal government, and have their origin in that provision of the federal constitution which declares that the constitution and laws of the United States made in pursuance thereof shall be the *supreme law of the land*. (*Const. art. 6, sub. 2.*) It will therefore be conceded that whenever the exercise of the taxing power by the states has been found to interfere with the free and full enjoyment of the powers granted by the constitution to the federal government, or to obstruct the due administration of those powers, or to impede the execution of the constitutional laws of con-

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gress, the exercise of that taxing power has been denied to the states as repugnant to the declared supremacy of the federal constitution and laws. (*McCulloch v. State of Maryland*, 4 Wheaton, 316. *Gibbons v. Ogden*, 9 Wheaton, 199. *Weston v. City Council of Charleston*, 2 Peters, 449. *Osborn v. Bank of the United States*, 9 Wheaton, 738.) It is upon this last named limitation upon the authority of the states to exercise the taxing power that the relators attempt to ground their objection to the assessment imposed upon their capital, and rest their claim to exemption from taxation. The facts upon which the relators rely as bringing them within the principles of the authorities establishing the limitation last noticed are stated in their petition as follows: (1.) That the steamships in which their capital is invested are subject to taxation by congress. (2.) That they are engaged in foreign commerce and in carrying the United States mails. But these facts constitute no valid claim to exemption from state taxation. The power of taxation being concurrent in the states and national government, it is manifest that the exercise of the power by the one does not impair the right of the other. Each may tax at the same time, and select the same subjects for taxation. (*Gibbons v. Ogden*, *supra*.)

II. The fact that the relators' ships are engaged in foreign commerce does not establish the right to the exemption claimed. The claim of the relators is predicated upon the presumption that the taxation complained of interferes with the power granted to congress by the eighth section of the first article of the constitution. This section provides that congress shall have power to regulate commerce with foreign nations, and among the several states and with the Indian tribes. It is not denied but that this grant of power to congress is exclusive of any right in the states to exercise that same power when its exercise by the state would interfere with that of congress. But the taxation of the relators is not in any light an interference with the exercise of this power by congress. There is no such interference. The statute by authority of

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which the assessment of the relators was imposed does not assume or pretend to *regulate commerce with foreign nations*, but contents itself with providing for the exercise of an entirely distinct and sovereign power—that of taxation—a power which has been shown to be concurrent in the state and national government. (*Gibbons v. Ogden*, 9 *Wheaton*, p. 10.) In this case, Marshall, Ch. J. says : “ There is no analogy between the power of taxation and the power of regulating commerce.” If the powers of taxation and regulation of commerce are thus distinct and separate, it is manifest that the state, in the exercise of the former, neither usurps nor impedes the right of congress to exercise the latter. There is no act of congress which exempts steamships engaged in foreign commerce from taxation. The state, therefore, in taxing the relators, cannot be said to have obstructed the execution of any law of the United States. The act in pursuance of which the relators were taxed does not challenge the supremacy of the federal constitution, nor that of any law passed under it, either by usurping the powers granted by the one or by impeding the execution of the other. The relators, therefore, have failed to bring themselves within any of the limitations upon the taxing power of the state. The right of the state to tax ships engaged in foreign commerce and in carrying the mails has, however, been affirmed by the very tribunal upon whose decision the relators rely to escape such taxation. (*Passengers' Case*, 7 *How*. 283.)

In this case, Justice McLean says : “ A state court cannot regulate foreign commerce ; but it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce, the same as other property owned by its citizens. A state may tax stages in which the mail is transported ; but that does not regulate the conveyance of the mail any more than taxing a ship regulates commerce ; but, yet, in both instances, the tax on the property, in some degree, affects its use.” There could not be a more positive affirmation of the right of the states to tax ships engaged in foreign commerce,

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or a more emphatic denial of the relators' claim to exemption from taxation based upon the fact that their property is employed in the transportation of the United States mail, than is contained in the quotation from the opinion of Justice McLean. A moment's consideration of the consequences which would inevitably result from the opposite doctrine will seem to confirm the wisdom of that eminent jurist's opinion. The same section of the constitution which clothes congress with the power to regulate foreign commerce, also grants the like power with respect to commerce among the several states. If the property engaged in *foreign commerce* is entitled to exemption, property engaged in *domestic commerce*, or commerce between the several states, is entitled to like exemption. The power to regulate the one is not more distinctly conferred upon congress than is the power to regulate the other, and any exemption which applies to the one must apply equally to the other. If, then, the relators' claim is valid, there is not a ship owner, railroad corporation, or express company in the state, that is not exempt from taxation. And every person and corporation engaged in conveying the mails is, upon the same principle, entitled to a like exemption. The only case which even hints in favor of the position assumed by the relators is that of *Brown v. State of Maryland*, (12 Wheaton, 419.) But that case is not analogous to the one at bar. No *special tax* has been imposed upon the relators *because of their being engaged in foreign commerce*; the only demand made is, that property which, in contemplation of law is located within the limits of the state, shall pay its due proportion in support of the government, ascertained by the operation of a law which makes no discrimination between the property of the relators and that of the other inhabitants of the state.

III. The power of the federal government to regulate commerce is not exclusive. (*Wilson v. The Blackbird Creek Marsh Co.*, 2 Peters, 250. *Gilman v. Philadelphia*, 3 Wallace, 715.)

(a.) In the case last cited, the following propositions are

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affirmed: "The states may exercise concurrent or independent power in all cases but three.

"1. When the power is lodged exclusively in the federal constitution. 2. When it is given to the United States and prohibited to the states. 3. When, from the nature and subjects of the power, it must necessarily be exercised by the federal government exclusively. The power here in question does not, in our judgment, fall within either of these exceptions." The only question involved in the case, was the power to regulate commerce. If, then, the tax assessed upon the relators amounted to a regulation of commerce, it would not be invalid unless it interfered with some regulation previously established by congress. There is no such conflict, and, for that reason, the claim of the relators must fail.

IV. The claim of the relators for exemption from taxation because the ships are engaged in carrying the United States mails, cannot be seriously maintained. It has been expressly repudiated in some of the decisions above cited, and has no foundation in law.

*By the Court, INGRAHAM, J.* I am at a loss to see how the taxation of this company can in any sense be deemed an interference with the power to regulate commerce with foreign nations. It imposes no rules or regulations on commerce, and in no way interferes with the transportation of freight or passengers. It acts, not upon commerce or its relations with foreign countries, but upon the property of the company, in the same manner that a tax on the personal property of the individual is raised upon a valuation of his personal estate, whether such estate consists of ships, or railroad stocks or money. The ground upon which the Supreme Court held that acts of the state, imposing a specific tax upon officers or seamen of a vessel were invalid, was that it interfered with the power to regulate commerce with foreign nations. Following this decision in *City of New York v. Miln*, (11 Peters, 136,) and the *Passenger cases*, (7 How. 283,) the utmost

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that could be claimed for it would be that the state could not interpose a specific tax on vessels arriving from foreign ports, whether in the form of a tax on vessels specifically, or on the officers or crew of the vessel, or as a tonnage duty, or in any other manner which would interfere with the free passage of such vessels from one place to another. Beyond that, I do not understand the rule and decisions to apply; and the right to tax an inhabitant of the state generally upon his personal property is not in any manner restrained because some part of such property is invested in ships or steamers. The same section which gives congress power to regulate commerce with foreign nations, also includes the commerce with the states, and if the relators are right in claiming that this provision exempts from taxation all property engaged in foreign commerce, it would also free from state taxation all the property of railroads running from one state to another.

It would go even farther than that, in restraining state power, for it would prevent a state court from compelling the payment of debts due by the owners of such vessels or stocks by the application of such property to such a purpose.

The same views are applicable to the other ground taken by the relators, in regard to contracts for carrying the mails of the United States.

I am not willing to adopt the construction contended for by the relators. The assessment complained of in no way interferes with the power of congress to regulate commerce either with foreign countries or between the states, and no good cause is shown why we should interfere with the assessment as made by the commissioners of taxes.

Judgment for the respondents.

[NEW YORK GENERAL TERM, November 5, 1866. *Leonard, Clarke and Ingraham*, Justices.]

## MATTHEWS vs. HOBBY.

On the 4th of November, 1864, the plaintiff, by a written contract called a sale note, sold to D. one hundred bales of cotton, quality even middling, at fifty-nine cents, "to arrive," for cash on delivery. On the 18th of December twenty-one bales of the cotton arrived, of which notice was given to S., the purchaser's agent, who selected nine of them as even middling, obtained possession of them, and sent them to the warehouse of the defendant, with directions to store the same, as the property of the Atlantic Delaine Company. Payment was claimed by the plaintiff to have been demanded, at the time the cotton was delivered to S. and refused. It was not pretended that the Atlantic Delaine Company paid, or parted with, any consideration for the cotton. But it appeared that the same was deposited with the defendant for the benefit of the company, in part fulfillment of a contract which D. had entered into with them, to deliver to them 200 bales of cotton on arrival.

*Held* 1. That although the Atlantic Delaine Company received the nine bales in question under their contract with D. and credited him therewith, yet as they had paid nothing for the cotton, they could not be protected as *bona fide* purchasers, against the plaintiff's lien, unless the plaintiff was originally not entitled to, or waived payment on delivery.

2. That either vendor or vendee could have regarded the contract between them as an entire contract. The cotton was "to arrive;" and until the whole of it should arrive, the one was not obliged to deliver, or the other to receive, any portion of it.

3. But that as D. the purchaser, did receive the nine bales, he was bound to pay for them, on delivery, unless the vendor waived this condition of the contract.

4. That a waiver could be effected either by express assent, or by acts, such as an unreasonable delay in demanding payment, or in not demanding it at all.

5. That the testimony upon the question of an express waiver being conflicting, it should have been left to the jury; and that the judge erred in taking it from them, and in refusing to admit evidence bearing upon that question.

The cases of *Champlin v. Rowley*, (18 Wend. 187,) and *Paige v. Ott*, (5 Denio, 406,) commented on, and held not to contradict the principles of this decision.

THIS was an action to recover the possession of nine bales of cotton of which the plaintiff claimed to be the owner. The defendant, in his answer, denied any wrongful detention of the property, and alleged that he was a warehouseman, and the cotton was delivered to him by the Atlantic Delaine Company, of Providence, Rhode Island, to be kept by him on storage, for them; that the cotton belonged to that com-

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pany, and the same having been replevied, he demanded judgment for the possession, and for the return and recovery of the cotton, with damages for the detention thereof. On the trial the plaintiff proved that on the 4th of November, 1864, he, through a broker, sold to one G. R. Drowne, one hundred bales of cotton, guaranteed to be even middling, at 59 cents "to arrive," for cash on delivery. A sale note to that effect was signed by the broker. On the 18th of December, 1864, twenty-one bales of the cotton arrived, of which notice was immediately given to one Skinner, the agent of Drowne. Skinner selected nine of these bales as even middling, obtained possession of them, without payment, and sent them to the warehouse of the defendant, to be stored, as the property of the Atlantic Delaine Company, and the plaintiff replevied them, in this action. The judge directed the jury to find a verdict for the plaintiff, and to find the value of the cotton, which they did; assessing the value of the cotton at \$2,700. The other material facts are sufficiently stated in the opinion of the court.

The defendant appealed.

*Man & Parsons*, for the appellant.

*Edwards Pierrepont*, for the respondent.

*By the Court*, CLERKE, J. The contract was for a sale by the plaintiff to Drowne of one hundred bales of cotton, quality even middling, at 59 cents, to arrive; cash on delivery. Twenty-one bales of the cotton had arrived; of which notice was immediately sent to Skinner, Drowne's agent, who selected nine of them, as even middling, in accordance with the contract, and obtained possession of them. According to the testimony of the plaintiff, immediate payment was demanded of the agent, on behalf of the plaintiff; which was refused. Skinner sent the cotton to the warehouse of the defendant, and told him to store it, as the property of the

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Atlantic Delaine Company, of Providence, R. I. This deposit of the goods with the defendant for the benefit of this company was alleged to have been made in part fulfillment of a contract which Drowne had entered into with them, some time previously, to deliver to them two hundred bales of cotton, at 64 cents, cash on arrival.

I. If the Atlantic Delaine Company can be regarded under that contract as *bona fide* purchasers of the nine bales in question, whether the plaintiff did or did not waive his right to payment on delivery to Drowne, he cannot maintain this action. It is not pretended that the company paid or parted with any consideration for them. The defendant's counsel, indeed, offered to show that Chapin, the treasurer of the company, had received the returns (in an account) of the nine bales, in the hand writing of Skinner; that he had given Drowne credit for the same in the books of the company, under the contract; and that in consequence of the non-performance by Drowne of his contract, the company had charged Drowne with the profit to them on that contract, against the amount due for the nine bales. This offer the judge overruled at the trial, on the ground that the proposed proof would not be sufficient to show that the company was a *bona fide* purchaser.

In *Palmer v. Hand*, (13 John. 433,) the rule which was then, and had been for a long time previously, most prevalent, was distinctly stated, and that is, "when goods are sold to be paid for on delivery, and during the delivery and before it is completed, the purchaser sells or pledges them to a third person for a valuable consideration, but without notice to the original vendor, the lien of the latter will not be affected, and he may recover them from such subsequent purchaser." In that case actual advances in cash were made to the vendee, by the defendant, to nearly the amount of the value of the goods, and while they were in course of delivery. The defendant was regarded as an innocent party who had in good faith advanced his money; yet the court did not pro-

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tect his claim against that of the original vendor. See also *Sargent v. Gill*, (8 *N. H. Rep.* 325;) *Copland v. Bosanquet*, (4 *Wash. C. C. Rep.* 594;) *Coggill v. Harlem and New Haven R. R. Co.*, (3 *Gray*, 545;) among the number. In *Smith v. Lynes*, (1 *Seld.* 41,) the Court of Appeals seems to negative this rule. It declares, in that case, that even where the delivery of goods to the vendee was conditional, yet if he sold them to third parties ignorant of the condition, the latter were entitled to the protection of *bona fide* purchasers, so far as they had paid for them. Lynes, the defendant in that case, had made an agreement with Thompson & Company before his agreement with the plaintiff, by which they agreed to take from him the goods which he afterwards purchased from the plaintiff. Some parcels of the goods delivered by Lynes to Thompson & Co., had been paid for by them to Lynes; other parcels received by them had not been paid for. But as these latter parcels had been delivered by Smith, the plaintiff unconditionally to Lynes, it is stated in the opinion of the court that the title of Thompson & Co. to them was perfect; although they had not paid for them; leaving us, necessarily, to infer that if the delivery to Lynes had been conditional, their title would not have been perfect against the plaintiff, in consequence of the fact that nothing had passed from them to Lynes. There was an agreement, as in the case before us, between Thompson & Co. and Lynes to take from him the goods which he afterwards purchased from the plaintiff, and the goods were received by them and credited to Lynes. Nevertheless, the court held that if any portion of those not paid for had been delivered by the plaintiff to Lynes, conditionally, they could not be protected against the original vendor's lien. This decides the question under consideration in the case before us. The Atlantic Delaine Company paid nothing for the nine bales of cotton; and although they received them under their contract with Drowne, and credited him with the receipt of them, they cannot be protected against the plaintiff's lien

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unless the plaintiff was not originally entitled to, or waived payment on delivery of the nine bales to Drowne's agent.

II. Either Mathews or Drowne could have regarded the contract between them as an entire contract. The cotton was "to arrive;" and until the whole of it should arrive, the one was not obliged to deliver, or the other to receive, any portion of it. *Russell v. Nicoll*, (3 *Wend.* 112,) is in many respects similar to the case before us. The contract was for the sale of 500 bales of cotton, to be delivered on its arrival in New York from New Orleans, to be paid for in cash on delivery, and to be delivered at any time between February and 1st of June, 1825. Eleven bales arrived before the 1st of June, which were demanded by the vendees, (the plaintiffs in the action,) and an offer of payment was made to the defendants, who refused to deliver any portion until the whole should arrive. Marcy, J., in delivering the opinion of the court, says: "The contract was for 500 bales; it was entire; there was no obligation upon the part of the plaintiffs to receive a less quantity than the whole; and, consequently, none on the part of the defendants to deliver less than the whole." So, in the case before us, the plaintiff was under no obligation, according to the contract, to deliver; nor was Drowne under any obligation to receive the nine bales, until the whole should arrive. But, as he did receive them, he was bound to pay for them on delivery, unless the plaintiff waived this condition of the contract. This, no doubt, the latter could have done, either by express assent, or by acts, such as an unreasonable delay in demanding payment, or in not demanding it at all.

III. Was payment on delivery of the nine bales waived by the plaintiff? The plaintiff's agent testifies that so far from waiving payment, he insisted upon it, as soon as he discovered that the defendant's agent got possession of the cotton. Comstock swears that "it was agreed between him and Skinner, Drowne's agent, that the cotton was to be paid for immediately upon the delivery of the weigher's bill and

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the receipt, and that the plaintiff was to hold the title and custody of the cotton until the money was paid." And he repeats this, in substance. If there was no testimony to contradict these clear and positive statements of Comstock and of the other witnesses of the plaintiff, the judge would have been correct in taking the consideration of the question from the jury. But Wenman, one of the defendant's witnesses, denies these statements. Skinner, Drowne's agent in the transaction, expressly contradicts Comstock, and testifies that nothing was said between them to the effect that the cotton should be paid for day by day as it was delivered. He states enough to show that Comstock waived immediate payment for the nine bales; provided that he (Skinner) would pay Sawyer, Wallace & Co. for cotton previously purchased by Drowne from them through Matthews. And see the agreement proved by Skinner, fol. 127. All this conflicting testimony should have been left to the jury. The defendant's counsel, besides, offered, several times, to show what was the condition or stipulation, with reference to the delivery of the nine bales, which was objected to; and the objection was sustained. I think this was error. The defendant's counsel, in making this offer, proposed to furnish express testimony in relation to the precise question before the jury—whether the plaintiff waived the condition of payment on delivery.

With respect to the question of the right of payment on the delivery of less than the whole contracted for, *Champlin v. Rowley*, (18 Wend. 187,) and *Paige v. Ott*, (5 Denio, 406,) referred to by the counsel of the defendant, do not contradict the principle which I have deduced from *Russell v. Nicoll*, (3 Wend. 112.) In the contracts stated in those cases, it was expressly provided that payment should not be required, until the whole of the thing contracted for should be delivered; except that in *Champlin v. Rowley* \$100 should be paid in advance; which had been done; and about which there was no dispute. Where there is no such provision, as in the contract before us, I repeat, therefore, that

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the vendor is not obligated to deliver, nor the vendee to receive, the goods, until the whole shall arrive; but if less than the whole be received by the vendee, and the contract stipulates for payment on delivery, the vendor is entitled to immediate payment for the portion delivered. Of course this right can be waived; and, as there was conflicting evidence on the question, in this case, the judge erred in taking it from the jury, and in refusing to admit evidence bearing upon that question.

The judgment should be reversed, and a new trial ordered; costs to abide the event.

NEW YORK GENERAL TERM, November 5, 1866. *Clarke, Mullin and Ingraham, Justices.*

THE PEOPLE, *ex rel.* The Buffalo and State Line Railroad Company, *vs.* PETER FREDERICKS, *et al.* assessors, and Geo. M. Pierce, supervisor of the town of Hamburg.

When the assessors, in their return to a writ of certiorari, state that they had perfected the assessment roll and delivered the same, duly certified, to the supervisor of the town, and that the same was not in their possession or control at the time the writ was served on them, the court will dismiss the writ, as to them.

The only questions the court can consider upon certiorari brought to review an assessment under the general tax law, are whether the assessors had jurisdiction to assess the relator, and have kept their proceedings within the bounds of such jurisdiction.

Assessors are not bound to reduce the value of the property of any party deeming himself aggrieved by their assessment to the amount fixed in his sworn statement and examination before them, but they are to fix the value after such statement is before them, as they may deem just, having in view the general duty to assess property "at its full and true value, as they would appraise the same in payment of a just debt due from a solvent debtor."

The real estate of railroad companies should be assessed at its value for the purpose to which it has been adapted, and not as mere farming lands; and in estimating the same, the assessors are not bound to consider it as mere land and superstructure isolated in their town from the other parts of the road. They are entitled to estimate the value of that part of the real estate

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within their jurisdiction which contributes to make up a complete and useful railroad extending beyond the town they represent. What may be properly considered in estimating that value discussed.

A railroad corporation should be regarded as a resident of the several towns and wards through which its road extends, within the meaning of the tax laws, and assessed therein for its real estate, the same as taxable inhabitants are assessed for their real estate situated therein. The real estate of railroad companies which is occupied and used by them for railroad purposes is not required to be assessed as "non-resident lands."

**C**ERTIORARI to review the assessment of the real estate of the relator, situate in the town of Hamburg.

The relator is a corporation, organized under the laws of the state, to construct and operate a railroad between the city of Buffalo and the western line of this state, along the shore of Lake Erie. Its road extends and is operated through the town of Hamburg, a distance of 9 29-100 miles. The assessors of that town entered the real estate of the relator on the assessment roll as follows : In the first column, "Buffalo and State Line Railroad Company ;" in the second column, "Extent of road in the town of Hamburg 9 29-100 miles ; amount of real estate in said town belonging to said company is 82 and 78-100ths acres—being a strip of land about four rods in width, extending through said town in a curved line and occupied by said company for a railroad, including superstructures and fixtures thereon, 82 78-100th acres." In the third column, as the value of the real estate, \$265,000. On the 21st of August, at the time fixed for the correction of the roll, the vice president of the company with the counsel of said company appeared before said assessors and applied to have the valuation of the real estate reduced ; and the vice president was examined on oath touching the value of said real estate, and his examination was reduced to writing and forms part of the return to the writ. On such examination he stated the value of the land at not to exceed \$40 per acre, or \$3311.20. The buildings and water pipes \$1600. The superstructure, which includes ties, chairs, rails, spikes, frogs and switches, as at present constructed, not to exceed \$63,-

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756.50. On his cross-examination he stated that he did not know what the cost of constructing the road was per mile. That his estimates did not include the cost of construction, such as grading, laying ties, rails, &c. That the cost of laying rails and iron would amount to about \$250 a mile. The cost of grading, 15 to 25 cents a yard for earth and from 35 to 75 cents per cubic yard for rock. That he had no means of estimating the number of yards of grading. That the last quotations of the stock of the road was 180 or 190. That he did not include in his estimate the value of the material used in cattle guards and bridges, and did not know its value. That the material used in them was principally stone, except the bridge over the stream that divides the town of Hamburg from Evans, the cost of which he did not know. That there were several culverts in the town built of stone, and that he did not know the amount or value of the stone put into culverts. That, if the road were put up and sold as a whole, its price would depend on the value of the stock; if that part in Hamburg were sold by itself, the land he thought would not bring to exceed \$40 an acre. That he did not know the original cost of the road per mile, nor the aggregate cost in the town of Hamburg, nor the original cost of the land on which the road runs.

The return also sets forth a statement made by the company and verified by the oath of George Palmer, president, filed with the assessors of said town, in June, 1853, and yet remaining on file in the town clerk's office, in which, amongst other things, the cost of the real estate of said company in the town of Hamburg is stated at \$293,977.

The assessors returned that no other examination or evidence was presented or offered to them or taken by them on the application to reduce such valuation, and that on the 25th day of August they fixed the value of the real estate at \$225,000, having reduced the same \$40,000 from the first assessment, and that they made and endorsed their decision as required by statute, upon the written examination of the

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vice president, and filed the same. They further returned that they estimated and assessed the said real estate of the company at its full and true value, as they would appraise the same in payment of a just debt from a solvent debtor. That the company, during the year 1866, actually occupied said real estate for the purposes of a railroad, over which frequent trains of cars were passing, and on which were situate tanks, station houses and ticket office, occupied by the agent and employees of said company. That the real estate of the relator is not set down in the assessment roll in a part separate from other assessments. The roll was duly sworn to and delivered to the supervisor, with the statutory oath endorsed, on the 25th day of August. The supervisor returns that he received it on that day, and that it remains with him in the same form as when delivered.

The case was brought to a hearing upon the writ and return.

*John Ganson*, for the relator.

*P. G. Parker* and *Geo. H. Hibbard*, for the defendants.

*By the Court*, DAVIS, J. The writ in this case appears to have been allowed on the 28th day of August, and served on the assessors on the 31st of the same month. On the 25th of August the assessors perfected the assessment roll and delivered it to the supervisor of the town. Thenceforth they had no power or control over it. For this reason the writ should be quashed as to the assessors. (*The People v. Supervisors of Allegany*, 15 Wend. 198. *Same v. The Mayor of New York*, 2 Hill, 9. *Same v. Supervisors of Queens Co.*, 1 id. 195. *Same v. Reddy*, 43 Barb. 539.)

Assuming that the writ is well brought against the supervisor, the only questions this court can consider upon this certiorari, are whether the assessors had jurisdiction to assess the relator; and have kept their proceedings within the

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bounds of such jurisdiction. (*The People v. The Mayor of New York*, 2 *Hill*, 9. *Matter of Mount Morris*, 2 *id.* 14. *Benton v. Brooklyn*, 2 *Wend.* 395. *Starr v. Rochester*, 6 *id.* 564. *Ex parte Mayor of Albany*, 23 *id.* 395. *The People v. Van Alstyne*, 32 *Barb.* 131. *Same v. Goodwin*, 40 *id.* 626. 5 *N. Y. Rep.* 568.) So far as relates to the amount of the assessment the sole question is, were the assessors bound to take the testimony of the vice president of the company, and the valuation given by him, as conclusively determining the sum at which the relator should have been assessed? The duty of these officers in making assessments is very plainly declared by statute. Except where "*they are specially required by law to observe a different rule*," it is enacted that all real and personal estate liable to taxation shall be estimated and assessed by the assessors at its full and true value, as they would appraise the same in payment of a just debt due from a solvent debtor." (1 *R. S.* 393, § 17, as amended by chap. 176 *Laws of 1851*, § 3. *Id.* 5th ed. p. 911, § 15.) All real estate within this state, unless expressly exempted, "whether owned by individuals or corporations," is liable to taxation, (1 *R. S.* 387, § 1,) and the real estate of incorporated companies is to be assessed, "in the same manner as the real estate of individuals." (1 *R. S.* 389, § 6.) The term "real estate," as used in these statutes, is expressly defined, "to include the land itself, all buildings and other articles erected upon or affixed to the same, all trees and underwood growing thereon, and all mines, minerals, quarries and fossils in and under the same, except mines belonging to the state." (1 *R. S.* 387, § 3.) By subsequent provision of the statute, any person considering himself aggrieved by his assessment, may apply to the assessors "to reduce the value of his real and personal estate as set down in the assessment roll," and it is made the duty of the assessors to examine the applicant on oath, touching the value of such real or personal estate, and after such examination and such other supple-

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mentary evidence, under oath, as shall be presented by the aggrieved party, they are required to "*fix the value thereof at such sum as they may deem just, under the rule prescribed*" by the section of the Revised Statutes first above quoted ; but if the applicant "shall refuse to answer any question as to the value of his real or personal estate, or the amount thereof, or present sufficient supplementary evidence, under oath, to justify a reduction, said assessors shall not reduce the value of such real or personal estate ;" and in case the assessors fix a valuation greater than the sum sworn to by the applicant, it is made their duty to endorse on the examination their "disagreement" in a prescribed form, and file the same with the clerk of the town, and furnish the applicant with a copy thereof. (1 R. S. 5th ed. 912, § 21. Laws of 1851, ch. 176, § 6. Laws of 1857, ch. 536, § 5.)

It is very clear to my mind that under these provisions the assessors still retain their judicial character, and are subjected to no arbitrary rule, by force of the examination of the applicant. On the contrary, they are expressly enjoined, after such examination is before them, to fix the value as *they may deem just*, having in view the general duty to assess property "at its full and true value, as they would appraise the same in payment of a just debt due from a solvent debtor."

But however this may be, it is apparent that the applicant in this case did not, by his examination, present any such sworn valuation of the property to be assessed as subjected the assessors to any obligation to substitute his estimate for their own. The property, it is to be borne in mind, was fixed and definite in its character and description, and in these respects was not subject to be changed by the oath of any one. It was before the assessors for personal and visual examination, and they were bound to see and know its identity and nature, as well as to listen to the sworn appraisal of the applicant. The examination of the vice-president gave no appropriate basis upon which the assessors were at liberty to act. It first reduced the 9 22-100 miles of railroad to the number of acres

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therein, (82 78-100 acres,) and then assumed to assess them as farming lands at \$40 an acre. It then appraised the buildings and water pipes ; and then, what is technically called the "superstructure," to wit: the ties, chairs, rails, spikes, frogs and switches ; and there stopped, upon the assumption that the assessors were bound by this partial dissection, and had no right to study the anatomy of railroads for themselves. On his cross-examination he acknowledged that his estimate included nothing for the construction of the road, the laying of the rails, grading, &c. and that he had made no estimate of the quantity of grading in that town—that he included nothing for cattle guards or bridges, or the value of the material in them ; nothing for the culverts and the material in them ; and the estimate itself shows that he made no allowance for the nearly twenty miles of fences, unless, indeed, they are included in the valuation of the land. In short, the applicant assumed that he was at liberty to control the assessment by severing the buildings and water pipes, and what is called the superstructure from the railroad, and resolving the residue into so many acres of farming lands, to be assessed as an ordinary farm. This was a great mistake, and it is not surprising that the assessors were able to see it. These officers are generally chosen for their practical good sense, and are apt to look at things *as they are*, and to disregard fanciful distinctions gotten up to make things appear to be what they are not, for the purpose of reducing their value. They were not called upon to assess a farm, but some nine miles of railroad—completed and operated as a railroad ; and the question was, what is the fair value, under the statute rule, of this real estate thus made into a complete and useful railroad. To sever, for the purpose of assessment, the buildings and superstructure, and call the residue farming lands, would be a gross absurdity. A farm four rods wide and nine miles long, intersected with public highways, cut up with cattle guards, culverts and bridges, divided lengthwise by a graded embankment with ditches on either hand occupying a large share of its wealth,

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would be a poor investment, either for cultivating or grazing purposes; and no assessor would be justified in appraising it at \$40 an acre because the adjoining farms, which were useful as such, were of that value.

The law, as well as good sense, required that the assessors should regard this property precisely what it was, and judge of its value accordingly. If they adopted any such subdivision of parts as that presented by the applicant, it would then be their duty after estimating the buildings and superstructure, to inquire as to the value of that portion of the railroad lying in their town, considering its embankments, ditches, bridges, culverts, cattle guards, cuttings, in short every thing that made it what it was; and determine its value in the condition to which these constituent parts of a railroad had brought it. As part of the data from which to judge of value, they were entitled to consider the cost of the real estate of the road and the productiveness of its use, for, while these are not the standard of value, they are elements through which the standard may be ascertained. In estimating a block of buildings, it would be strange indeed, if assessors might not take into consideration its cost and the amount of rent actually netted from it; and while these facts would not necessarily control, they certainly should influence their judgments. The company had filed with former assessors a sworn statement, showing that their real estate in the town of Hamburg cost \$293,977.00. I think this statement was properly before the assessors, and might justly be considered by them for the purpose above suggested. I have no question, also, that in estimating the value of that portion of the railroad in their town, they were not bound to consider it as an isolated parcel of the company's road, terminating at the boundaries of their town, and having no connections beyond. They were entitled to look upon it as it is, a portion of a completed railroad with its appropriate termini, and to ascertain the value of so much of the "Buffalo and State Line railroad," as lies in their town, limiting their consideration of it only to the value of

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that part of the real estate within their jurisdiction, which contributes to make up the entire thing, stretching in both directions beyond them. A railroad whose termini were the town lines of Hamburg would be worth little or nothing. Its just valuation would be small, because its use would be trifling. But it is another thing, when the railroad through that town has no such termini, and is greatly valuable for that very reason. A flouring mill situated in one town which conducts its waters through an artificial race from a pond situated in another town, is not to be assessed as though it were a mill without a pond, and therefore of little value. Nor if a town line cut in half a valuable store, could the owner claim that each town should assess its part as the half of a store which had no other half. Each part would be properly assessable as the half of a whole store; and for the same reason the relator's railroad in Hamburg is to be assessed as part of a whole railroad. And the fact, that the whole is a valuable and productive property reflects upon the value of the parts, not to equalize their value by making each mile equally valuable with every other, as was claimed in the *Albany & Schenectady Railroad v. Osborn*, (12 Barb. 223,) but to enable the assessors of each town to judge how valuable the portion in their town is, considered as an essential part of a valuable whole. I think if the relator's road were not worth half its cost, and had never paid its running expenses, there would be little difficulty in convincing the assessors of every town that that fact should be considered as affecting the assessment of the portion lying in the several towns.

I am not able to see any reason for saying that the assessors in this case had not jurisdiction to fix the amount beyond the partial estimates of the vice-president. Nor if his estimates of value had covered the entire property, do I see any ground upon which this court could interfere to control the right of the assessors to exercise their own judgment in appraising the real estate, in accordance with the established rules of valuation. A specific thing was to be appraised, and not some-

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thing indefinite, and not certainly known to the assessors. No amount of testimony could change the character or extent of the property; and hence the estimate of the applicant could at most be but his opinion of values, or furnish data upon which other opinions could be formed. A different rule as to *personal assessments* was thought to prevail in *The People v. Reddy*, (43 Barb. 539,) but that was a case where the party testified that he *had not* the amount of personal property for which he was assessed, and claimed certain deductions from the amount he swore he had. If the assessment had been upon \$10,000, and the applicant had exhibited \$10,000 in green backs, but had sworn they were worth but \$5000, I fancy the law would allow the assessors to exercise their own judgment; and that, in principle, would be analogous to a case where an applicant undertakes to correct his assessment by swearing that a parcel of real estate, the quantity and character of which is not disputed, is worth less than the assessors' estimate. The only effect of such an oath is to set in motion again the judgment of the assessors, in order to reach a "*just value*" under the statutory rule.

But it is claimed that the assessors had no jurisdiction to assess the relator *in personam* for its real estate, but should have entered the same on the roll as non-resident lands. No such question was raised before the assessors. On the contrary the company appeared by its vice president and counsel and substantially conceded that the assessment was correct in form but erroneous in principle. It is manifest if this point had then been taken that the assessors could readily have corrected the roll in accordance with the suggestions or request of the relator. Under such circumstances I doubt if this court ought to entertain the point now made, in a proceeding where the exercise of its authority is purely discretionary, and where if not estopped by its own conduct, the relator has another remedy, if the point be well taken. The question whether the lands of a railroad corporation can be assessed in the several counties through which the road

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runs against the corporation itself or only as non-resident lands is one by no means free from doubt under the statutes. But for more than twenty years the law has received a practical construction by a probably invariable usage, that ought not to be interfered with. The serious consequences that would result by subjecting assessors and boards of supervisors to innumerable suits, if it were to be held that the assessments of the companies in such cases were made without jurisdiction, are properly to be considered. The railroad companies have acquiesced in this form of assessment, and it is manifest that it is greatly more advantageous to them than to have the portions of their roads in the several towns of the state set down and returned as non-resident lands, thus subjecting them to numerous dangers and embarrassments. The nature of their property is such as to show that the legislature never had it in contemplation in providing for the assessment of non-resident lands: but aimed to reach property of a character entirely different from that of a continuous line of railroad owned and operated by an incorporated company. This idea will not fail to strike every one who reads the provisions of the statute relating to the assessment of the lands of non-residents. (1 R. S. 391, §§ 11, 14, 5th ed. 1 id. 390, §§ 11, 44.) These sections speak of *tracts of land subdivided into lots; and tracts not subdivided into lots*; concerning which they give directions and make provisions which seem quite inapplicable to a railroad track. They evidently had in view the vast tracts of wild land situated in different parts of the state, when the law was enacted; which was prior to the construction of any railroad in our state. The statute on the subject of the place in which property is to be assessed, is as follows:

§ 1. Every person shall be assessed in the town or ward where he resides when the assessment is made, for all lands then owned by him within such town or ward and occupied by him or wholly unoccupied.

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§ 2. Land occupied by a person other than the owner may be assessed to the owner or occupant or as non-resident lands.

§ 3. Unoccupied lands not owned by a person residing in the ward or town where the same are situated shall be denominated "lands of non-residents," and shall be assessed as hereinafter provided.

§ 6. The real estate of all incorporated companies liable to taxation, shall be assessed in the town or ward in which the same shall lie, in the same manner as the real estate of individuals. All the personal estate of every incorporated company liable to taxation on its capital shall be assessed in the town or ward where the principal office or place for transacting the financial concerns of the company shall be. \* \* \*

Although these sections do not specifically provide for the assessment of lands, *actually occupied by the owner who is not a resident of the town or ward where the same are situated*, yet it has been held that they should be construed to carry that class of lands into the class of "lands of non-residents" as defined by the third section. It is not material I think to show that this construction is erroneous.

It is enough to show that all lands are to be assessed, and that the form of entering them in the assessment roll has been properly pursued in this case. The provisions directing the assessors how to prepare the assessment roll in respect to taxable *inhabitants* and in respect to lands of non-residents are found in article 2, of title 2, of part 1, chapter 13 of the Revised Statutes, (1 R. S. 390.)

But the provisions directing the same thing in respect to incorporations are found in title 4 of the same chapter, (1 R. S. 414.) That these provisions are general is seen by the head note of the chapter, "Regulations concerning the assessment of taxes on incorporated companies." The 6th section of this title declares that "the assessors shall enter all incorporated companies from which such statements" (referring to statements required in preceding sections to be served in towns where the capital is assessable) "*and the*

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*property of each company and the property of all other incorporated companies liable to taxation in their respective towns, in the assessment rolls in the following manner.*" In the first column the name of the incorporation. In the second column the quantity of real estate owned by such company and situated within their town or ward; and in the third column the actual value thereof estimated as in other cases.

This section will bear the construction that it is *the property liable to taxation*, of all incorporated companies, that the assessors are required to enter in the assessment roll in the form directed by the section. And upon that construction, railroad companies have every where been assessed *in personam* upon the portions of their roads lying in the several towns.

This view was taken as early as 1834, by the Chancellor, in *The Mohawk and Hudson R. R. Co. v. Clute*, (4 Paige, 384.) After collating the several sections above referred to, he says: "When this chapter of the Revised Statutes was passed, and when it went into effect, on the first of January, 1828, no railway had been constructed in this state, and only one charter had been granted. It is not surprising, therefore, that no special provision in relation to such companies should be found in the tax laws. They must be governed by the general provisions relative to the taxation of the real and personal estates of corporations.

Taking the several provisions to which I have above referred, together, I think it is evident that such companies whose stock, or the principal part thereof, is vested in the land necessary for their road, and in their railways and other fixtures connected therewith, are taxable on that portion of their capital as real estate in the several towns or wards in which such real estate is situated. \* \* This is unquestionably the most equitable mode of taxing such property, as it gives to each town and ward, through which the railway runs, its

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fair proportion of the tax imposed upon the property of the company."

In the *Albany and Schenectady R. R. Co. v. Osborne*, (12 Barb. 223,) the Supreme Court seems to have adopted the same view as to the construction of this statute.

In the mass of litigation in this state that has grown out of the taxation of railroads, it is apparent from all the reported cases I have seen, except one, that the assessment has been made upon the company for its road, and not upon the road as non-resident lands; and in none of them has the question been suggested that the form of the assessment was not proper. In the single case above referred to, (*The New York and Harlem R. R. Co. v. Lyon*, 16 Barb. 651,) "the land was assessed as the property of non-residents," and the court, at special term, held the collector liable to an action for seizing the property of the company, although the company was also named in the assessment. The learned judge in his opinion referred to no authorities, and his attention seems not to have been called to the provisions of the statute relative to the assessment of corporations.

The amendment to this chapter, passed in 1857, obviously proceeded upon the idea that the assessment should be made upon the company and not upon the road as non-resident lands. One section required a personal call by the collector "upon the treasurer of the corporation or the agent of the nearest station" for the taxes, a thing which there would be no occasion to do if the assessment was simply of non-resident land. Some of the provisions of these amendments were afterwards repealed, but they have left an illustrative odor behind them. Even if erroneous, a construction so long acted upon and acquiesced in, ought to be considered as sanctioned and sanctified by time.

But I am strongly inclined to think that a railroad company should be considered as a resident of the several towns through which its road extends, within the meaning of our tax laws. To most corporations a fixed locality is given by

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their charters as the place of their business operations. This locality they cannot change without the consent of the legislature, and it becomes the legal residence of the corporation. But a different rule prevails with railroads. They are organized for the purpose of constructing a road between specified places, and to conduct their business along such road through its whole extent. They own and occupy the entire road, and in every town thereof, through which it passes, they have and use all the characteristics of inhabitancy that can attach to a corporation. The *locality* of the corporation may, in such case, justly be said to cover the route of which the company has the constant and potential occupancy and use, and to be everywhere co-extensive with the road itself. If it have a *principal office or place* for transacting the financial concerns of the company, the statute has expressly provided that that shall be the place where its personal property or capital shall be assessed; but without this express enactment the personal property might be assessed in each town where it was owned and used. It is claimed that the locality of the principal office determines for all purposes the legal residence of the corporation. But this does not necessarily follow; because with railroad companies the principal office may be changed at pleasure or convenience to any point along the route. Indeed, there is nothing in the law to prevent the company from having its principal office in a railroad car and running it up and down the track, as the exigencies of business may require. The principal office does not therefore give *locality to the corporation* in the sense in which it does to a purely local company. It simply for convenience sake determines where the capital is to be taxed, but leaves the imaginary being which the law has created to inhabit the whole road it has constructed and owns, and which is the sphere of its corporate powers. The corporation cannot do what it was created to perform without being in a legal sense omnipresent along its entire road; and so there is no more legal difficulty in saying that its residence is co-extensive

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with the road than that the residence of a banking corporation is where its operations are by law required to be carried on. (*Sherwood v. Saratoga R. R. Co.*, 15 Barb. 650. *The People v. Pierce*, 31 *id.* 138. *Belden v. N. Y. and Harlem R. R. Co.*, 15 How. 17.)

In commenting upon section 6, 1 R. S. 389, in *Oswego Starch Co. v. Dolloway*, (21 N. Y. Rep. 452,) that eminent and able jurist, Chief Justice Denio, says: "The greater number of these corporations were incorporated for carrying on some financial or industrial enterprise in some particular city or town, and this circumstance of locality was a part of their legal constitution; but a great many were of a character which did not permit them to be confined to any one local division of the state. Navigation companies, turnpike companies and canal companies were of this class \* \* and some others whose business was of a general nature. In the aggregate these corporations, unattached to any particular town or city, were very numerous. Without some special provision to meet the case, it would be impossible to determine in what place they were to be assessed on their capital; but as all property of joint stock corporations was to be taxed somewhere, there would be great uncertainty as to the place of taxation in such cases, and they might be assessed in the several towns or cities through which their operations extended, and this would be likely to produce a conflict among the different jurisdictions, and to cause much inconvenience to the companies as well as to the public."

For this well expressed reason the limitation of personal taxation was enacted; but no such reason could apply to the real estate of corporations, and that was therefore left to be taxed in each town where it is situated. And it seems to me no stretch of the law to say that a corporation like the relator, in which the circumstance of locality can be no part of its legal constitution, except as it is identical with the sphere of its operations, can lawfully be said to reside in or inhabit every town where its road lies or is operated, so far at least

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as "residence" is essential to the form in which its real estate is to be taxed. I am aware that a very able judge of the Superior Court of Buffalo has come to a contrary conclusion upon this question, and the respect to which his opinion is justly entitled, makes me distrustful of my own. The question is by no means a clear one, and it is of so important a character that further and immediate legislation ought to remove all doubt. I think, however, that it is our duty to affirm the proceedings in the case before us, upon all the questions herein discussed. (a)

Proceedings affirmed.

[ERIE GENERAL TERM, November 19, 1866. *Marvin, Davis and Daniels*, Justices.]

(a) The following letter of instructions, from the comptroller to assessors, written since the making of the above decision, relative to the assessment of corporations, showing the practice which prevails in the comptroller's office, may be useful to the legal profession, as well as to assessors; and is therefore published in connection with the above decision:

"STATE OF NEW YORK, Comptroller's Office, Albany, May 28d, 1867.  
CHARLES W. PIKE, Esq. Assessor, Evans, Erie Co. N. Y.

DEAR SIR: Your favor of the 20th inst. is received. In reply I would say that the laws now in force, regulating the assessment of railroads, are included in chapter 18, title 4, part 1, of the Revised Statutes, and require,

1st. That the real estate shall be assessed in the town or ward where the same shall be, and the personal estate in the town or ward where the principal business office is situated.

2d. That the officers of these corporations shall, on or before the 1st of July, in each year, deliver to the assessors of any town or ward, where they are liable to taxation, a written statement specifying the real estate owned in each town and its cost, the capital stock paid or secured to be paid, and the proportion of any held by the state or any incorporated literary or charitable institution, and the town or ward where their principal business is transacted.

3d. That their property shall be entered, by the assessors, in the assessment rolls, if in the town or ward where the principal office is located, in conformity with section 7, chap. 18, title 4, part 1 of the Statutes. In other towns or wards, where there is nothing but the real estate to assess, it would appear unnecessary to do more than simply enter the name of the corporation, describe the property and estimate its value.

4th. That the roadway, superstructure and buildings, if any, which constitute the real estate, shall be assessed on the standard of actual value for the purpose to which they have been adopted, and not as mere land.

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5th. The capital stock which covers the personal estate, including the surplus, if any, over ten per cent, shall be assessed on the same principle, after deducting the assessed value of the real estate and taxable stock of other corporations, as required by section 10, chap. 18, title 4, part 1 of the Statutes. The best criterion of the value of a stock is the market price, which, when it can be ascertained, represents the intrinsic value more nearly than any other standard within reach of the assessors.

It may be added that the difficulty of arriving at a correct interpretation of the laws for the assessment of corporations is increased, from the fact that they are general, applying to all classes, and affording no distinct and well defined rule in special cases. The construction given to them by this department in their application to railroads is believed to be in conformity with judicial decisions, and will, it is presumed, afford an intelligent answer to the inquiry contained in your letter of the 20th inst.

There have been no important changes in the law since the publication of compilations distributed in 1856, except such as are included in 5th edition of the Revised Statutes, which is the edition here referred to.

Respectfully yours,

THOMAS HILLHOUSE, Comptroller."

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DYER, administrator, &c. vs. DYER and others.

Where, upon an application by an administrator, to the surrogate, for leave to mortgage or sell the real estate of the intestate, a claim of the respondent, against the estate, which was disputed by the administrator, was tried by the surrogate, and after several witnesses had testified to conversations between the intestate and the claimant, which established a "transaction" between them, in relation to the subject matter of the controversy; *Held* that the claimant could not be examined as a witness to prove that no such conversations had occurred—that no such transactions had taken place; such testimony being "in respect to a transaction had personally between the deceased person and the witness."

THIS was an appeal from a decree of the surrogate of the county of Albany, in which he allowed a claim of Hannah A. Dyer, one of the respondents, against the estate of the intestate.

The proceedings were commenced by the administrator, for the purpose of obtaining leave to mortgage, or sell, the real estate of the intestate, for the payment of his debts.

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Upon the return of the order to show cause, the administrator gave a schedule of debts, and among them was the claim of the respondent Hannah A. Dyer, for work and labor of herself and her son, for the intestate, which was disputed by the administrator. The surrogate proceeded to try the validity of the claim. It appeared that the claimant was a sister of the intestate, and the services were rendered while she and her son, who was a minor, were residing in his family, and constituting a portion of it, on his farm in Westerlo, Albany county. The administrator introduced several witnesses who testified that on numerous occasions the deceased had told Hannah to leave, and that he would not pay her any thing for staying with him. The respondent was examined in reference to these conversations between her and the deceased. Objection was made upon the ground that the evidence tended to show a transaction between herself and the deceased. The objection was overruled, and the testimony admitted by the surrogate, to which the administrator's counsel duly excepted. Other evidence was received, and questions raised, not material to be stated. And, after due consideration, the surrogate made a decree allowing the claim of the respondent, at \$535, and all the costs and expenses of the administrator and of the respondent's counsel. From this decree an appeal was taken, by the administrator, to the general term.

The case was submitted upon printed points.

*R. W. Peckham, Jun.* for the appellant.

*Henry Smith,* for the respondent.

*By the Court,* MILLER, J. I think that the surrogate erred in admitting the evidence of the respondent to contradict the testimony introduced to prove conversations between her and the deceased.

Section 399 of the Code, as it was in force in 1866, at the time of the hearing before the surrogate, provides for the

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examination of a party "as a witness in his own behalf, or in the behalf of any other party," &c. "except that a party shall not be examined against parties who are representatives of a deceased person, in respect to any transactions had personally between the deceased person and the witness." While this provision allowed parties to be sworn as witnesses, the exception was intended to close the mouth of the living party, in all cases where the other party was deceased. It was designed to prevent a party from testifying as to any transaction where the other party had no opportunity to be sworn and to give his version of the matter. This object would be entirely defeated if, after proof by disinterested witnesses of a transaction occurring between two parties, one of whom was deceased, the party still alive should be permitted to come upon the stand and testify that no such transaction took place.

It is very evident that the conversations proved upon the hearing to have occurred between the deceased and the claimant related to a transaction between them, and was within the exception contained in the provision of the Code above cited. The evidence of the claimant also bore upon the same transaction. The latter tended to prove the incorrectness and the falsity of the evidence introduced by the administrator upon the hearing to establish the transaction. It showed that no such transaction had taken place; that no such conversations had transpired.

The testimony admitted clearly was "in respect to a transaction had personally between the deceased person and the witness." Before it can be fairly claimed that it was not, it must be assumed, I think, without authority, that there was no such proof as that introduced, or that it was false and untrue. This, I think, is not warranted upon any reasonable hypothesis.

It is said that proof that no such transaction occurred, is not an examination in respect to such a transaction. After a careful examination of this position, I am of the opinion that it is not a satisfactory answer to the objection urged to

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the testimony. Several witnesses had testified to conversations which established a transaction between the parties, in relation to the subject matter of the controversy before the surrogate, and there was at least *prima facie* evidence of its existence. It was certainly established until proof was introduced to the contrary, and without such proof must be thus regarded. It is therefore no answer to say, that the evidence received did not relate to the transaction, because it proved that none such existed. It was "in respect" to the transaction; and it might as well be claimed that as the occasions when the alleged conversations between the parties took place had been identified by the witnesses on both sides, that proof contradicting the material facts did not relate to the transaction itself, but only showed that it never happened.

It would, I think, be an evasion of the spirit and scope of this provision of the Code to hold that proof contradicting the evidence introduced had no relation to the transaction which had been established by the witnesses introduced by the administrator, because it proved that no such transaction had ever taken place.

The evidence admitted was material, and may have had a decided influence upon the decision of the case. As it was erroneously received, and for this error the proceedings must be reversed, it is not essential to examine the other questions raised.

Decree of the surrogate reversed, with costs to abide the event, and the case remitted to the surrogate for further proceedings therein.

[ALBANY GENERAL TERM, December 8, 1866. *Miller, Ingalls and Hogeboom, Justices.*]

## COLE vs. BELL and others.

The act of congress, passed in 1864, entitled "An act to provide internal revenue for the support of the government," was intended to impose a stamp duty upon all writs and *other process* issued by a justice of the peace, when the amount claimed is one hundred dollars, or over. It therefore embraces a summons.

Where the notice of appeal from a judgment of a justice of the peace, though specifying several grounds of error, did not specify the want of a stamp upon the summons as one of them; *Held* that as the objection involved a question of jurisdiction, it was not waived by the notice of appeal, but could be raised at any time during the progress of the action.

No objection can be urged on the argument of the appeal, to the notice of appeal, because no revenue stamp was put upon it. Such objection can only arise on a motion to dismiss the appeal.

**A** PPEAL from a judgment of the county court of Ulster county.

This action was brought before a justice of the peace of Ulster county, by summons, in which the plaintiff claimed damages to the amount of two hundred dollars or under. Upon the return of the summons the defendant appeared and objected to the summons upon the ground that it was "lacking revenue stamps, said summons claiming over one hundred dollars." The summons had no stamp upon it, and the justice overruled the objection. The defendant refused to answer, and withdrew from the action. The plaintiff complained upon a promissory note, and a trial was had, which resulted in a judgment in favor of the plaintiff for the amount of the note and costs, being \$75.15. Some other proceedings were had, prior to the complaint being put in, which are not necessary to be stated.

The defendant appealed from the judgment to the county court. The notice of appeal, which was not stamped, specified several grounds of error; but did not state the want of a stamp as one of them. The county court, upon argument, affirmed the judgment, and the defendant appealed to the general term of the Supreme Court.

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Cole v. Bell.

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*T. R. Westbrook*, for the appellant.

*J. E. Van Etten*, for the respondent.

MILLER, J. I think that the act of congress, passed in 1864, entitled "An act to provide internal revenue for the support of the government," was intended to impose a stamp duty upon all writs and other process issued by a justice of the peace, when the amount claimed is \$100 or over. (*U. S. Stat. at Large*, 1863 and 1864, 291, 292, §§ 151, 201, *schedule B.*)

The act cited first provides for the payment of a stamp duty upon any "writ or other original process by which any writ is commenced in a court of record." It then enacts, that "when the amount claimed in a *writ* issued by a court not of record is one hundred dollars or over," it shall pay a stamp duty. It subsequently qualifies the preceding enactment by a proviso that "no writ, summons or other process, issued by and returnable to a justice of the peace, except as *hereinbefore provided*," &c. shall be subject to the payment of stamp duties.

The act is somewhat obscure, in the provisions cited, and not very carefully drawn, thereby rendering its construction a matter of no little difficulty. The general tenor and object of the provisions of the act referred to, appears to be, to impose a stamp duty on legal process. And although some criticism may be made upon the employment of the word *writ*, in the second clause cited, as well as its general phraseology, yet I am inclined to think that taken in connection with the preceding clause and the subsequent proviso, it was not used by the law makers as a word of limitation, so as to confine its application to that class of process issued by justices of the peace, in a technical sense. It would rather seem to me that the second clause was intended, in view of what subsequently follows, as a mere qualification of the first, in reference to writs not in a court of record, and embraces

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other process, as well as writs. This construction is supported, I think, by the proviso afterwards, which includes all process "except as hereinbefore provided."

If a "summons or other process" issued by a justice of the peace, was not included there, there would have been no necessity for employing the words last mentioned. It may also be said with some force, I think, that if the preceding clause contained no provision requiring a summons to be stamped, there was no necessity for saying that "except as before provided," a summons need not be stamped.

The authorities upon the question considered are somewhat conflicting; but the only general term decision where the question has been directly presented, holds that a stamp is essential in a case like the one at bar, and that the act is constitutional. (*Baird v. Pridmore*, 31 *How. Pr.* 359.) This is decisive, and disposes of the point in favor of the appellant.

It is urged that the point discussed is waived by the notice of appeal, which does not specify the objection taken to the stamp as a ground of error.

The authorities are somewhat conflicting upon the question whether any grounds can be urged besides those which are incorporated in the notice. (*Forman v. Forman*, 17 *How. Pr.* 255. *Irwin v. Muir*, 13 *id.* 409. *Derby v. Hannin*, 15 *id.* 32. *Bush v. Dennison*, 14 *id.* 207.) As the point made involves a question of jurisdiction, I am inclined to think it can be raised at any time during the progress of the action; and for this reason the objection is not a valid one.

I am also of the opinion that no objection can be legitimately urged to the notice of appeal, because no revenue stamp was put upon it, on this argument, but could only arise on a motion to dismiss the appeal. (*Armstrong v. Smith*, 44 *Barb.* 120.)

It is not necessary to discuss the other question made, and as there was error in the justice's court, the judgment of the justice and of the county court, must be reversed, with costs.

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 Tyler v. Hoornbeck.
 

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HOGEBOOM, J. I think this judgment is properly reversed upon the ground stated in the foregoing opinion. In this district it has not been supposed that the appellant was *limited* to the grounds of appeal set forth in his notice of appeal, provided other tenable objections distinctly appeared in the proceedings before the justice—such especially as were capable of being obviated.

I am further inclined to think the other ground of reversal was well taken. There does not seem any just ground of suspicion that the application to dismiss the suit was *mala fide*; and there was certainly strong presumption for supposing the justice was a *material* if not *indispensable* witness for the defendants; and we must be careful not to give to this statute so strict a construction as to deprive it of all substantial value.

INGALLS, J. concurred.

Judgment reversed.

[ALBANY GENERAL TERM, December 17, 1866. *Miller, Ingalls and Hogeboom, Justices.*]

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 TYLER vs. HOORNBECK and others.

Motions for a new trial on the ground of *surprise* are addressed very much to the sound discretion of the court, and if it satisfactorily appears that, to promote the ends of justice, an opportunity should be presented for the introduction of new testimony, the court will furnish it by setting aside the verdict and granting a new trial.

Where the alleged surprise consisted in calling one of the defendants as a witness for the plaintiff, in violation of a promise claimed to have been made by the plaintiff's attorney to the defendant's attorney, by reason of which the latter was unprepared to impeach the witness, as he would have been had such promise not been made: *Held* that the discretion of the court was properly exercised in granting a new trial, on terms.

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Tyler v. Hoorbeck.

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**A**PPEAL from an order made at a special term granting to the defendant, Benjamin C. Hoorbeck, a new trial, upon the ground of *surprise*. The alleged surprise consisted in calling Stephen Stickles, one of the defendants, as a witness for the plaintiff in violation of a promise claimed to have been made by the plaintiff's attorney to the defendant's attorney, by reason of which the defendant's attorney was unprepared to impeach Stickles, as he would have been if such promise had not been made. The judge who held the special term granted the motion on payment of the costs of trial (except the usual allowance) and ten dollars, costs of the motion.

*T. R. Westbrook*, for the appellant.

*J. Hardenburgh*, for the respondent.

*By the Court*, MILLER, J. Motions for a new trial, of the character of the one now presented for our consideration, are addressed very much to the sound discretion of the court, and if it satisfactorily appears that to promote the ends of justice an opportunity should be presented for the introduction of new testimony, the court will furnish it by setting aside the verdict, and granting a new trial. (1 *Gra. & Wat. on New Trials*, 462. *Platt v. Munroe*, 34 *Barb.* 291.)

Although the affidavits upon which the motion in this case was originally heard, are somewhat conflicting, yet I cannot resist the conclusion that the defendant's counsel allowed the trial to proceed under a belief that the defendant Stickles would not be called to testify upon the trial. Such being the case, he was obviously taken by surprise by the evidence given by Stickles. And unless some legal principle interposes itself as an insuperable obstacle, I think he was entitled to the relief granted by the special term. (*See* 34 *Barb.* 296.)

I think that there is no such difficulty in the way of the order granting a new trial. It is not, by any means, clear but that the testimony of Stickles was the main evidence relied upon

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Tyler v. Hoornbeck.

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by the jury, in the disposition of the case ; and I do not think that the residue of the testimony is so entirely satisfactory as to warrant the conclusion that the jury would have rendered the same verdict if Stickles had not been sworn as a witness.

The motion in this case is not based upon the sole ground that the witness Stickles can be impeached, and that it should be granted for that reason, but it rests upon a claim that there was an understanding that he should not be called as a witness, in consequence of which the defendant proceeded to trial, and neglected to subpoena witnesses whose attendance had been procured at a previous term of the court for the purpose of impeaching him.

The disposition of it, therefore, is not to be governed entirely by the rules of law which are applicable to the cases where the party relies solely upon impeaching testimony. The true question then, is, whether the party here acted in good faith ; relied upon the agreement which he made ; and was taken by surprise by the act of the other party in calling this witness.

It is plain to my mind, that his reliance upon the agreement which he positively swears was entered into, was the cause of his not being prepared to meet the testimony of the witness thus, unexpectedly to him, put upon the stand, and that it was a surprise upon him that the witness was called and sworn.

Although the defendant's counsel neglected to ask the court that a juror be withdrawn, and thus seek to obviate the difficulty, I do not think he should be remediless because he has made a mistake and failed to avail himself of a technical rule of practice. It is quite common to grant relief under such circumstances as are here presented, when justice demands it.

In cases like this, no precise rule can be laid down which can always be invoked. The decision of them must, of necessity, be left somewhat to the discretion of the court where the trial is had. (*Gra. & Wat. on New Trials*, 1085.) And

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*Baskin v. Baskin.*

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the doing of substantial justice is ever to be kept in view. (*Id.* 1086.)

I think that the discretion conferred was properly exercised by the judge at special term, and that the ends of justice will be promoted by an affirmance of the order granting a new trial.

Order affirmed, with ten dollars costs of appeal.

[ALBANY GENERAL TERM, December 8, 1866. *Miller, Ingalls and Hogeboom*, Justices.]

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WILLIAM R. BASKIN, appellant, *vs.* STEPHEN BASKIN and others, respondents.

Where all the requisites to the due execution of a will are fully complied with and proved, so far as relates to *one* of the attending witnesses, and as to the *other*, it is proved that although he did not see the testator sign the will, it having been signed before he came into the room, yet that he signed the same as a witness, at the testator's request, and heard him declare at the time that it was *his last will and testament*, this is sufficient proof of the execution of the will to admit the same to probate, though the testator does not state to the witness that he has signed the will.

THIS is an appeal from the sentence or decree of the Surrogate of Yates county, refusing to admit to probate a paper writing propounded as the last will and testament of William Baskin, deceased. The deceased died the 7th day of January, 1866, at the age of eighty-nine years, and the will bore date the 1st day of December, 1865. The two subscribing witnesses were the only witnesses examined for the purpose of sustaining the will, and they testified substantially as follows: Henry Smith, one of the witnesses, and the writer of the will, says, "I saw the deceased subscribe his name to this instrument at the time he declared it to be his last will and testament; at the same time I signed my name as a witness in his presence, and at his request." On a cross-examination he testified, that "*No one was present when he*

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*subscribed the will but myself.* "After the deceased signed the will, and after I had signed my name to it, Mr. Wilsey was called in. I then took up the paper and handed it to him and said, "do you publish this to be your last will and testament? Said he did acknowledge that to be his last will and testament. I do not recollect as he said anything more at that time, only that he said to Mr. Wilsey that he wanted him to sign his will as a witness." Mr. Wilsey, the other subscribing witness, testified as follows: "I knew William Baskin, deceased, in his lifetime. The instrument now shown to me purports to be his last will and testament. It was dated the 1st day of December, 1865. I am a subscribing witness to this instrument; I was called in to sign this will. After it was written I was called in the room. The deceased said to me he wanted me to sign this will, and the will was presented to William Baskin, deceased, and he took it into his hands, and was asked if that was his last will and testament? And he said, this is my last will and testament. I then signed it. I signed it in the same room. *It had been signed before I came into the room.* He did not state to me that he had signed it. Mr. Smith's name was to it when I was called into the room." On a cross-examination the witness Wilsey further testified: "William R. Baskin said his father wanted I should witness a will. After the will was written, I think, Mr. Smith called William R. Baskin to the door, and then William said they wanted I should go in there. After I went in I asked deceased how he was getting along? He told me. He said he wanted me to sign this paper or will. At this time I had not seen the paper. The paper was then handed the deceased, and he then said what I said on my direct examination. *He did not say anything about that being his signature. I did not see him sign it.*" Several witnesses were examined on the part of the contestants, as to the competency of the testator to make a will.

The surrogate after hearing the proof and allegations of the respective parties, made a decree on the 12th day of June,

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1866, refusing probate of the will, in which the surrogate adjudges and decrees, that the instrument in writing was not executed and attested in the manner prescribed by law for the execution and attestation of last wills and testaments, and that said instrument was null and void as or for the last will and testament of William Baskin. From which decree William R. Baskin, one of the parties named as executor in said writing, appealed to this court.

The principal question presented by the appeal was whether the will was properly attested; or in other words, whether the proof shows that it was signed by the testator in the presence of *each* of the attesting witnesses or acknowledged by the deceased to have been signed by him, to each of the witnesses.

*S. H. Welles*, for the appellant. I. Was the will executed according to law? It is claimed by the respondents that the second subdivision of section 35, page 144, vol. 3, 5th edition of the Revised Statutes, has not been complied with

I shall, in the first place, notice the cases relied on by the respondents, and compare them with the case at bar. The first is *Chaffee et al. v. The Baptist Missionary Convention*, (10 *Paige*, 85.) In this case, the subscribing witnesses testified that when they went into the decedent's room, she took the instrument, which then had her name to it, out of her drawer, and, putting her finger on her name, said: "I acknowledge this to be my last will and testament. She did not admit, in the presence of *either* of the witnesses, that she had subscribed her name to the will, or that any one else had done so by her authority, and upon this evidence the Chancellor held the will not duly executed. In this case, there was *no evidence* of the signing. In the case at bar, one of the witnesses, Smith, testifies to every thing required by the statute, and from his evidence it appears that all the requirements of the statute were fully complied with. The next case relied on by the respondents, is *Lewis v. Lewis*, (1 *Kern*.

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Baakin v. Baakin.

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220.) That case differs very materially from the one at bar. In that case, the witnesses did not even see the signature, but the paper was so folded as to conceal it, and the witnesses signed their names to a paper without either of them seeing the signature, or even knowing that there was any there.

The next case is *Rutherford v. Rutherford*, (1 Denio, 33.) In that case neither of the witnesses saw the decedent execute the will. I have not been able to find a case in which the probate has been denied where the facts were like those in the case at bar. In all those cases, it appears that *neither* witness saw the execution, and there was no evidence of the signing.

II. It is claimed that the will in the case at bar was substantially executed according to law.

The requisition of our statute, that the testator should declare the instrument to be his last will and testament, as a distinct formality, does not destroy the effect of such a declaration as an independent fact to establish, with other circumstances, a compliance with any other formality required by the statute, and such a declaration made in regard to a will *actually subscribed* by the testator, and accompanied by circumstances which show a knowledge on his part of the requisites of the law, and an intention to comply with them, is a sufficient acknowledgment within the statute, that such subscription was made by him.

The only point to be examined in this case is, whether the decedent acknowledged the signature to have been made by him to the witness Wilsey. It is said by the respondents that each of the four requirements of the statute are separate and independent acts to be done, and must each be performed separately and independently of the other. The case of *Coffin v. Coffin*, (23 N. Y. Rep. 9,) has settled a different doctrine. In that case, the publication of the will and the request to sign it as witnesses were both included in one answer of the testator, and the objection was taken that the will was not properly executed, because these two things were not done

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as separate and independent acts, but the court overruled the objection. The court, in its opinion, says: "All that the statute requires is, that the act of publication and the act of requesting the witnesses to sign, shall both be performed. These acts are distinct in their nature or quality, but their performance may be joined or connected. If a testator should say to a witness, 'I desire you to attest this instrument as my last will and testament,' the language would import, not only a request, but a clear publication of a will."

The testimony in this case shows a substantial compliance with the statute as an acknowledgment of the signature to the witness Wilsey.

It is not necessary that the testator should say, in so many words, "that is my signature," or, "I wrote my name there," or, "I acknowledge that I signed my name there," but a production of the will, with the name of the testator signed to it, and a request to the witness to sign it as a witness, is a sufficient acknowledgment of the signature, and more especially where as in the case before the court, the actual signing had been proved by one of the subscribing witnesses.

The case of *Jauncey v. Thorne*, (2 Barb. Ch. R. 40,) contains a collection of a large number of authorities upon the question of what is a sufficient acknowledgment. But it is said by the respondents that that case was an adjudication upon a will, executed under the act of March 5th, 1813, concerning wills. True, but the court discuss what is an acknowledgment of a signature, and if those cases are good law, then in the case before the court there was a sufficient acknowledgment of the signature to the witness Wilsey.

Upon this point, I refer to the 5th New York Surrogate's Reports, 344, and to *Peck vs. Cary*, (27 N. Y. Rep. p. 9,) and especially to that part of the opinion commencing on page 29. (See also *Orser v. Orser*, 24 New York Rep. 51.)

III. This will should be upheld unless there is a total want of compliance with some absolute requirements of the statute, because the disposition of the property of the testator is pre-

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cisely in accordance with the divisions he had been making from time to time for three years previous to executing the same, that is, two parts to each son to one part to each daughter. It therefore is clear that the will is as the testator intended, and his intentions should not be frustrated, if possible to uphold them.

*D. B. Prosser*, for the respondent. I. The proponents fail to prove that the will was signed in the presence of *each* of the attesting witnesses, or that the testator acknowledged that he had signed the same, to each of the witnesses, as required by the 2d subdivision of the 40th section, 2 R. S. 63, and the decree of the surrogate in rejecting the will should be affirmed, because the 40th section, 2 R. S. 63, requires four things to be done in order to the due execution of a will. 1st. That the will should be subscribed by the testator at the end of the will. 2. Such subscription shall be made by the testator in the presence of each of the attesting witnesses; or shall be acknowledged by him to have been so made to each of the attesting witnesses. 3d. The testator, at the time of making such subscription, or at the time of the acknowledging of the same, shall declare the instrument to be his last will and testament. 4th. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will at the request of the testator.

Each of these four requirements are independent acts to be done and performed, in order to a valid execution of a will, and the omission of either is fatal. (*Remsen v. Brinckerhoff*, 26 Wend. 331. *Chaffee v. The Baptist Missionary Society*, 10 Paige, 85. *Rutherford v. Rutherford*, 1 Denio, 33. *Lewis v. Lewis*, 13 Barb. 17-24. *S. C.* 1 Kern. 220. *Butler v. Benson*, 1 Barb. 535.)

In this case the evidence is clear that but one witness was present at the time of the subscribing of the instrument by the testator. It was signed and witnessed by Smith before the other witness was called into the room or saw the instru-

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ment. But one of the witnesses had any knowledge of the signing by the testator. The witness Wilsey testified, "That he did not see testator sign the instrument, and that he said nothing to him about the signature." It is quite evident from this that the witness did not understand the testator as alluding to the signature, when he declared the instrument to be his last will and testament. What the witness understood from this declaration, was simply that the instrument was his will, and not that it had been signed by the testator. All that was said and done by the testator in the presence of the witness Wilsey, was necessary to be said and done in order to comply with the third subdivision of section 40, which requires the testator at the time of subscription or at the time of acknowledging it, to declare the same to be his last will and testament. The statute requires the subscription or the acknowledgment thereof to be made at the time of publication. To allow what the statute requires to be done in addition to an acknowledgment of the signature, to have the force and effect of such acknowledgment, would in effect be doing away with the 2d subdivision, which requires the acknowledgment to be made. The acknowledgment of the signature and publication are two separate and distinct acts which the statute requires to be done, in order to a valid execution of a will. The performance of one cannot be deemed as a performance of both. The statute evidently intended that there should be two witnesses to the signature or acknowledgment thereof, as well as to the publication, and that each witness should be able to prove the signature. Here we have but one witness who says anything in relation to the signature. The witness Wilsey does not even testify that he was acquainted with the handwriting of the deceased, or that the signature was in the handwriting of the deceased.

In *Remsen v. Brinckerhoff*, (26 Wend. 331,) before cited, it was held that the acknowledgment of the signature was not a publication within the meaning of the statute. It is difficult to see if the acknowledgment of the signature was

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not a publication, why the publication should be regarded as an acknowledgment of the signature, when each of the acts are required to be performed as independent acts.

In *Peck v. Cary*, (27 *N. Y. Rep.* 9,) and several other cases of the same class, the court has found, notwithstanding the witnesses failed to recollect that all the requirements of the statute had been complied with, that the will has been properly attested, yet in no case has the court intimated that any one of the four requirements of the statutes could be dispensed with. On the contrary, the court has found from the attestation clause, and the other facts and circumstances, that all the requirements of the statute had been complied with.

In the case now before the court, there is no ground for presuming that the testator acknowledged the signature to the witness Wilsey. He fully negatives any thing of the kind, nor can any presumption arise from the lapse of time, and want of recollection on the part of the witness, as the will was written the 1st day of December, 1865. The witness was examined the 5th day of March, 1866, a period of a little over three months only having elapsed.

The surrogate has found as a fact, from all the evidence and circumstances of the case as they appeared before him, that the testator did not acknowledge to the witness Wilsey, that he had signed the paper, or that his name was signed thereto by his direction. It was peculiarly within the province of the surrogate to determine what was intended by the publication in the manner detailed by the witness, and his decision should not be disturbed, unless manifestly erroneous. (*Lewis v. Lewis*, 1 *Kern.* 223, &c.)

*By the Court*, E. DARWIN SMITH, J. The refusal of the learned surrogate, as appears from his careful and able opinion submitted to us, to admit the will in this case to probate, was put by him upon the single ground that it was not signed by the testator in the presence of each of the attesting witnesses, or acknowledged by him to have been so signed to

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each of such attesting witnesses. Confessedly all the other requisites to the due execution of a will prescribed by the statute were fully complied with, and all such requisites were fully complied with and proved so far as respects the due execution and publication of the will in the presence of *one* of the attesting witnesses. The witness, Henry Smith, testified that he drew the will, saw it signed by the testator, heard him declare it to be his last will and testament, and signed it as a witness at his request. The other witness, Wilsey, did not see the will signed by the testator, but signed the same as a witness at his request and heard him declare that it was his last will and testament at the time. This witness also testified that the will had been signed by the testator before he came into the room, and that the testator did not state to him that he had signed it. This witness not having seen the testator subscribe the will, it was essential to its due execution that the subscription thereto by him should have been acknowledged by him to have been so made to such witness. The witness testifying that no such acknowledgment was in terms made to him, the learned surrogate held that the will was not duly proved and this provision of the statute had not been complied with, in respect to its execution. The execution of a will is to be proved like any other fact, and a will may be established upon the testimony of one of the subscribing witnesses against the testimony of the others, and also against the testimony of both of the subscribing witnesses. (*Trustees of the Auburn Seminary v. Calhoun*, 25 N. Y. Rep. 425, and see opinion of Denio in *Tarrant v. Ware*, note to case. *Orser v. Orser*, 24 id. 54. *Peck v. Cary*, 27 id. 9.) In most of the cases where this question has arisen there has been a conflict in the testimony of the attesting witnesses, or a failure of recollection on the part of one of them in respect to what occurred at the time of the execution, and the same was established upon the weight of the evidence corroborating and sustaining the witness testifying to the execution of the will. In this

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case there is no such conflict. The witnesses were not together when the testator signed the will, and did not sign the same as witnesses at the same time or in the presence of each other. They were however both present in the room with the testator when the witness Wilsey signed the will as an attesting witness as stated by him, and both testify in respect to what then took place, and there is not any particular discrepancy in their testimony. They both say that the testator took the will into his hands and said it was his last will and testament and requested the witness Wilsey to sign it as a witness. The will has not the usual attestation clause written under or at the foot of it reciting the particulars required by the statute to authorize the making of a will. It has the simple attestation following: "signed and published in the presence of." It is then signed by the witnesses, immediately under the name of the testator, so that both the witnesses must have seen the name of the testator when they signed it. The names of the witnesses are written in close proximity and relation to that of the testator, nearly as much so as though they were executing the same instrument as the co-obligors to a bond, or contracting parties to any other instrument in writing. It was therefore virtually impossible for the witnesses to have signed their own names to this will without seeing that it was in fact, or purported to be, signed also by the testator, or by his name. If it were necessary to find, as a matter of fact, that the testator in express terms declared that his name thus signed to this will was so signed by him, or that on calling the attention of the witness to such name so written at the foot of the will, he should say in express terms, "this is my signature," then I think the decision of the surrogate would be correct and that he properly refused to admit the will to probate. But I think it quite clear that such is not the rule, and that such formality is not required. A will is now to be established or rejected in view of all the facts attending its exe-

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cution, and an actual or implied acknowledgment is held in repeated cases to be sufficient. In *Jauncey v. Thorne*, (2 Barb. Ch. 59,) Chancellor Walworth said, on this point: "the production of the will with his name subscribed to it and in such a way that the signature could be seen by the attesting witnesses, and the request of the testator that they should witness the execution of the instrument by him as his last will, would of itself be a sufficient acknowledgment of his signature to render the will valid." That is this case exactly. It could not be described in more appropriate language. The Chancellor cites in support of this construction of the statute quite a number of cases. In *Illiot v. Geage*, (3 Curteis' Eccl. Rep. 160,) the learned judge, Sir Herbert Jenner Fust, said: "The production of a will by a testator, it having his name upon it and a request to a witness to attest it, would be a sufficient acknowledgment under the present statute. (See also 2 Hagg, 282; *Hall v. Hall*, 17 Pick. 373; *Cockrane's will*, 3 Bibb. 494; 2 Curties' E. L. 415; *Gaze v. Gaze*, 3 id. 451; *Keigwin v. Keigwin*, Id. 607; *Blake v. Creight*, Id. 547.) An acknowledgment of the testator's signature in this case I think was clearly involved in his presentation of the will to the witness Wilsey signed by him, and asking him to sign it as a witness immediately under his own name, as much so as if it had been a promissory note and he had asked the witness to sign it as surety or a co-maker. Such request would have implied a declaration that the note was signed by him, or a recognition of the signature thereto as his genuine signature. This must be a sufficient acknowledgment. To require more is to strain the strict letter of the law to the destruction of its spirit and intent, and would be to substitute form for substance. This would be in conflict with the current of the later decisions in this state, in the Court of Appeals and in this court. (*Lewis v. Lewis*, 10 N. Y. Rep. 224. *Coffin v. Coffin*, 23 id. 9.) The learned surrogate erred, I think, in refusing to admit the will to probate, and his order declaring that the said will was

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not executed and attested in the manner prescribed by law for the execution and attestation of last wills and testaments, should be reversed and the will ordered to probate, with costs to be paid by the estate.

Order of surrogate reversed. (a)

[MONROE GENERAL TERM, December 8, 1866. *Wells, E. D. Smith and Johnson, Justices.*]

(a) The above judgment was affirmed by the Court of Appeals, June, 1867.

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THE PEOPLE, *ex rel.* William A. Sale and others, *vs.* THE CITY OF BROOKLYN, in the matter of North Tenth and and North Eleventh streets.

The dedication of land, for the purposes of streets, binds the parties interested, though made by commissioners appointed to make partition between the owners.

And subsequent conveyances referring to such streets, and including the land to the centre of the street, will be held to convey the land in the street—not as unincumbered property, but as and for the purposes of public streets.

**C**ERTIORARI to review the proceedings of commissioners appointed to open North 10th and North 11th streets in the city of Brooklyn.

Prior to the year 1838, Charles O. Handy, William Sinclair and Silas Butler, were the owners as tenants in common of a large tract of land, embracing the premises in question. In 1838, Silas Butler being then deceased, a suit was commenced in the Court of Chancery by Handy and Sinclair against the heirs of Silas Butler, and an actual partition made among the several parties to the suit. The land lying between First street and the East River, the centre of North 10th street on the south, and the centre of North 11th street on the north, in this partition was allotted to some of the heirs of Silas Butler, through whom the title has passed by several meane

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conveyances to the Messrs. Sale, Poillon and Lawrence, the present owners. The commissioners in partition prepared and filed a map to accompany their report, and on this map North 10th and North 11th streets are shown as streets, and correspond with the streets as laid down on the village map. But all the conveyances from the Butler heirs down, in express terms convey the land in the streets to the centres thereof respectively, and the report of the commissioners in partition conveyed the premises in question in such a manner as to carry the grantees to the centres of said streets, although reference was made to the streets as such. At the time this map was made and filed, the only open or traveled thoroughfare or highway over this property was First street, running north and south and nearly parallel with the East River. The high water mark or line of the East River is shown on this map as being about 100 feet west of the westerly line of said First street. No proceedings were ever taken by the public authorities to open either North 10th or North 11th streets. Neither were these streets ever used by the public, but as appears by the affidavit of Minor H. Keith, the entire block bounded by North 10th and North 11th streets, including the half of each street, has been enclosed by a fence for twenty-nine or thirty years, and has ever since been used and held adversely by the owners and lessees, as against the public, access being had only by a private gate by the permission of the owners and occupants. As before observed, at the time the map in partition was made and filed, the high-water line of the river was near the westerly line of First street; since that time a large portion of the block, including also the part lying in the two streets, has been filled in by the owners, at their private expense, under permission given by legislative acts, and thus a large piece of new upland has been made.

The land lying in the two streets is valued at about twenty thousand dollars, but the commissioners, acting under the advice of the corporation counsel, allowed the owners only

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nominal compensation, on the ground that the making and filing of the map in partition worked a dedication of the land to public use.

On the motion to confirm the report of the commissioners, which was made at special term, before Mr. Justice LOTT, affidavits were read in opposition to those filed on behalf of the relators, in support of the report. These affidavits go to show, that prior to the year 1848 the entire land in the vicinity of the premises in question was an unfenced common. First street being used as a thoroughfare along the river shore, the land between the street and the river being an open shore or beach where the tide ebbed and flowed.

The report was confirmed, Justice LOTT delivering the following opinion :

LOTT, J. "The proof offered by Mr. Dubois in relation to the value of his lands taken for North Twelfth street, is not sufficient to overcome the valuation of the commissioners, assuming that we have the right to consider that question. Mr. Hondlow does not swear that he is acquainted with the value of this land, but if he did, his individual opinion cannot be deemed of greater weight nor entitled to more consideration than the opinion of the three commissioners. Their report should therefore be confirmed.

I am also of opinion that the commissioners correctly decided that the portion of North Tenth and North Eleventh streets, belonging to Richard and Cornelius Poillon, William A. Sale and A. M. Lawrence, referred to in their objections, had been dedicated to public use. The object of the petition referred to in the affidavit of Mr. Lowell, was to dedicate the land laid down as streets on the partition map to public use, and the subsequent conveyances of the land now owned by these objectors, also referred to in that affidavit, must be deemed to convey the land within the lines of these streets not as absolute and unincumbered property, but as and for the purposes of public streets. The other affidavits read in

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support of the report show the use of the lands as public thoroughfares.

Objections were also urged on the motion, against the confirmation of the report on North Tenth street, on the ground that their land had been improperly treated in the valuation of it as dedicated to public use. No written objections were filed by them to the report. They therefore cannot properly be heard now. Assuming, however, that it is competent for them to raise that question here, I am satisfied that their objections cannot prevail. The same reasons against it exist as in the case of Poillon and others above considered, but in addition to those, it appears by the affidavits of Mr. Lowell, that in the conveyance of the property to Andrew B. Hodges and others, under whom Marston & Powers derive title, the land within the streets was spoken of as "forming the streets," and was declared to be conveyed, subject to the use of the said land by the public generally as public streets. I will add here, that this deed was executed in 1845, prior to the deed from the same grantors, or a part of them, to Thomas H. Devyr, under whom Poillon and others derive their title. I refer to this fact here as a circumstance to show that North Tenth street, referred to in both these deeds, was treated by the grantors as a public street.

Upon the whole of the facts, I am satisfied that none of the objections are well founded.

Objections overruled, and reports confirmed."

A certiorari was then sued out, and the proceedings removed to the general term of the court.

*A. McCue*, for the relators. I. The dedication must be voluntary, and must be manifested beyond any reasonable doubt. The beneficial ownership in land is not to be destroyed upon mere implication.

II. The filing of the map was the act of the commissioners appointed by the court. It was not the voluntary act of the

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parties to the suit. The dedication of these lands to public use was not a matter before the court, nor within its jurisdiction. The acts of the commissioners, therefore, cannot be of any binding obligation on the parties to the suit, or their grantees.

III. As appears from the affidavits filed, the premises in question, in the report of the commissioners, are bounded by the streets, not by the sides of the streets, so that those who became the owners, under the partition, of the land fronting on either street, took the centre of each street respectively.

IV. All the conveyances from the time of the making of the report expressly include the land lying in the streets, shewing no intention on the part of the owners to dedicate the same to public use.

V. Assuming that the filing of the map by the commissioners, and the submission or acquiescence therein of the several parties to the suit, amount to an adoption of the map, still these acts, unaccompanied by any other acts, such as fencing off the land intended to be retained as private land, from that proposed to be given to public use, would only go to shew an intention at some future time to dedicate the lands to public use, and that intention could be legally revoked at any time before the rights of the public or third parties had intervened.

VI. No such rights have intervened. The public authorities have never exercised any acts of authority over these streets; they have never been paved or graded by them. To test the question upon this point: suppose the city of Brooklyn were sued for some accident which had happened on account of the condition of either of these streets, would not the city have a perfect defense in the answer that, by no act of the city, had the city ever accepted the streets, &c. ? If the municipality has incurred no obligations, then, in relation to these streets, can it have acquired any rights in the same ?

VII. Third parties are not any more interested in this claim of dedication than are the public. The relators are the owners

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of all the land fronting upon these streets from First street to the river. Harney, whose affidavit is in the case, and who purchased a lot fronting on First street, is not in a condition to claim a dedication ; he purchased upon a highway already opened, to wit, First street. See *Badeau v. Mead*, (14 Barb. 328,) which establishes the doctrine that the only right of way given by the filing of a map is to the nearest highway, and in relation to the doctrine of dedication there is no distinction between country roads and city streets.

VIII. Neither of the affidavits read in support of the report shew that either of these streets have ever been actually used as streets. Particular attention is called to these affidavits : " They were open and free for the passage of all persons to and from the river and First street, and traveled by persons going to and from the river," but they nowhere state that any persons ever did go to and from the river over these streets, and yet these affidavits might be true and consistent with the affidavits filed on behalf of the relators, which shew that access was only had to the river through a private gate upon the premises of the relators. This would establish nothing more than a mere license, or permission, not a dedication.

IX. Conceding, then, there was manifested an intention, at some future time, to dedicate these lands to public use, it was competent to revoke that intention. (*Holdane v. Trustees of the Village of Cold Spring*, 23 Barb. 103.)

This intention was revoked by the fencing in of the land lying in the streets more than twenty years ago. Within that time, therefore, it is conceded that the land in these streets has never been used by the public. Whatever license or permission have been acquired by them has long since been forfeited by non-use.

X. If it were true that these lands had ever been used as public highways, there would have been no necessity for these proceedings, since under the city charter the continuous use of any street by the public for five years gives the corporation full power and authority over the same, in the same manner

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as if it had been opened by law. (*Laws of 1862, chap. 63, sec. 41.*)

XI. The city of Brooklyn is estopped from claiming that these streets were ever traveled or opened or existed in any way as streets, except on the village and city map. The petition for the appointment of commissioners recites that the application is made under an act of April 12, 1862, (*chap. 184, fol. 23.*) This act gives the common council power "to open, continue and complete to the East river, and to the permanent bulk-head line, any and all the streets in the late city of Williamsburgh, the westerly termination of which are now at First street in said late city, or at the East river ;" \* \* \* and makes all laws now in force in relation to opening streets, &c. applicable, "except such part thereof as requires a petition or consent of the owners of property affected thereby ;" and the petition also recites that the application is made to open said streets from First Street to the permanent bulk-head line in the East river.

XII. At the time of the doing of the acts which are claimed to amount to a dedication, the high water line was within about one hundred feet of the westerly line of First street.

The balance of the street to the permanent bulk-head line, a distance of several hundred feet, is all made land, filled in under an act of the legislature, passed 23d April, 1855. (*See Laws, p. 123.*) As to this land, it cannot be pretended that there was an intention of a present or future dedication, and the relators are entitled to compensation for so much as lies beyond original high water mark.

XIII. The several acts under which these proceedings are taken are void—they violate the provision of the constitution, "that private property shall not be taken for public use without just compensation." (*Sec. 6, art. 1 Const. Title 4 of the City Charter, as amended by ch. 63, sec. 14 to 17, of Laws of 1862.*) Under this act, one set of commissioners estimate the value of the land taken ; another board subsequently assess the expense of the improvement upon the land lying

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within the district of assessment ; but before the report of the commissioners of estimate can go before the board of assessors, the report must be confirmed by the Supreme Court. The person to whom the award is made should know before he is called upon either to oppose the report or to acquiesce in it, how much he is to be assessed for the improvement. In order to complete the improvement, the means of raising the cost of the improvement, by a proper distribution, as well as the estimating of the cost, should be both provided for. Under the present law, these two acts are performed by two distinct independent bodies, and at different times. When, therefore, the report of the commissioners of estimate comes up for confirmation, the owner cannot tell whether he will be justly compensated or not for his land—the compensation will be just or unjust precisely in the proportion that he is fairly or unfairly assessed for the improvement. The charter makes no provision for compensation of any kind for the land taken. Until that is done, no valid proceeding can be had which shall conclude the same. His right to be paid for his land cannot be made contingent upon the action of any other board ; nor can his award be deducted for any assessment, nor be left to depend upon the payment into the city treasury of any balance of assessments, since that is the only fund out of which any awards, or balance of awards, can be paid. Suppose, however, that the report of the commissioners of estimate and the board of assessors should be confirmed, at which time the right of all parties become ultimately fixed, and it turns out, either because the lands assessed for the improvement are not worth the assessment, or because the owner will not or cannot pay the same, where is the owner to get his compensation for the land taken ? It is no answer to this, that the owner may hold on to his land in the street until he is paid his award, because this might result in depriving ninety-nine persons, who had paid their assessments, of the benefit of the contemplated improvement, because the hundredth man would not, or could not, pay his.

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The law which attempts to work such an injustice is unconstitutional and void.

XIV. The effect of the report of the commissioners is to compel the relators, not simply to furnish their half of the streets in question, but also to contribute to the payment of the cost of the other half of said streets, contrary to the well established rule that each side of the street should furnish its half.

The report should be sent back for correction, and the order confirming the report be reversed, with costs.

*Sidney V. Lowell*, (assistant corporation counsel,) for the respondent. I. The lands taken for these improvements south of the centre line of North 11th street, the northern boundary of the "Butler, Handy and Sinclair" tract, were dedicated and reserved for use as streets to the said parties and their grantees, a large number of persons.

By the division of the property owned by Sinclair, Handy and Butler's heirs, according to the plan shown on the partition map, the land forming the various streets laid down on the map was given up for use as streets and reserved as such to all of the parties among whom the lots were divided and their grantees. The Butler heirs had lots set off to them upon each of the streets laid down upon the map, and Handy and Sinclair each had lots set off to them upon nearly all the different streets. The value of each lot was made up not only from its situation upon the street upon which it fronted, but from the fact that there was a neighborhood of contiguous city lots and streets, a convenience of access to other houses and lots *and to the river*.

II. The streets in question having been dedicated to the use of the purchasers of the lots shown on the map, and a large number of lots having been sold by reference to this and another map showing the streets in question, all the grantees under these deeds acquired a right to use the said streets as they exist or may be formally laid out, and upon the opening

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of the streets under legal proceedings the parties who own the naked fee of the streets, subject to the easement, are entitled to nominal damages only. This has been settled by a line of decisions forty years old. (*Livingston v. Mayor, &c. N. Y.*, 8 *Wend.* 85. *Wyman v. Mayor, &c. N. Y.*, 11 *id.* 487. *Matter of Furman street*, 17 *id.* 661. *Matter of 32d street*, 19 *id.* 128. *Matter of 17th street*, 1 *id.* 262. *Matter of Lewis street*, 2 *id.* 472. *Matter of 29th street*, 1 *Hill*, 189. *Matter of 39th street*, *Id.* 191. *Matter of 4th avenue*, 11 *Abbott*, 194. *Watertown v. Cowen*, 4 *Paige*, 510. *Clements v. Village of West Troy*, 10 *How. Pr.* 199. *S. C.* 16 *Barb.* 251. *People v. Lambier*, 5 *Denio*, 9. *Bissell v. N. Y. Central R. R.*, 26 *Barb.* 630. *S. C.*, 23 *N. Y. Rep.* 61. *City of Oswego v. Oswego Canal Co.*, 2 *Selden*, 257. *Matter of 23d street*, *Wood v. City of Williamsburgh, MS. Opin. Gen. Term*, 2d district.)

III. It is not necessary, to fasten the right to use the streets, that they should have been actually practically opened and traveled, but such right continues and ensues whenever such streets are opened. This is expressly held in *Livingston v. The Mayor, &c.*; *Wyman v. The Mayor, &c.*; *Matter of 39th street*; *Matter of Furman street*, above cited.

IV. The case of *Holdane v. The Trustees of Cold Spring*, (21 *N. Y. Rep.* 474,) cited by appellants, does not affect the case in question unfavorably. The judge delivering the opinion says: "If, however, private rights have been acquired with reference to such dedication and such an interest secured with the assent and concurrence of the owner as would render it fraudulent in him to resume his rights, the dedication becomes irrevocable." (21 *N. Y. Rep.* 479.) In the case of the *City of Oswego v. Canal Co.*, (2 *Selden*, 257-267,) cited above, Judge Edmonds points out the distinction in like language; as also in *Bissell v. N. Y. Central R. R.* (26 *Barb.* 630 and 23 *N. Y. Rep.* 61.) The case of *Badeau v. Mead*, (14 *Barb.* 328,) decided by Judges Strong and Barculo, Judge Brown dissenting, is also not applicable to this case.

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That decision relates to roads over rural property, and Judge Strong quotes the language of Chancellor Walworth, that "the principles of construction applicable to grants of property in the country do not apply to conveyances of city lots." The case relates to a small plot of ground laid out into plots in the country on the New York and New Haven railroad and "the road to White Plains;" the premises were not even in a country village, but only "adjacent thereto." Considered otherwise than as a decision relating to rural servitudes it would be contrary to the decisions of the highest courts and the best jurists of the state.

V. In regard to what interest the parties in interest have received by their deeds in terms. The conveyance to Poillon, Sale and others (grantor, Devyr,) is of lots fronting on streets shown on a map, but by particular description by metes and bounds, which by bounding the lots on the *side* of the streets exclude the same. (*Wetmore v. Law*, 34 Barb. 515, &c.) The clause conveying all the right, title, &c. of the grantors to the "*streets*" opposite is a grant of the land as and for "*streets*," and which conveys the naked fee only subject to the easement over the ground for street purposes.

VI. *As to the constitutional point urged.* It is said that "the person to whom the award is made should know before he is called upon whether to oppose the report or acquiesce in it, how much he is to be assessed for the improvement." This might well be urged before a legislative committee as a matter of expediency in legislation, but not here. No doubt the person whose property is to be taken would like to anticipate the report of the assessors as to how much his adjoining property is to be assessed, but to oblige him to wait for a week or two, until that report is made, is not a violation of the constitution. When the report of the board of assessors is made, he can contest it if it is not fair, as well as the report of the commissioners. Each report, in this regard, stands on its own bottom. The commissioners can only award for the fair value of the land. The assessors can only

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assess the fair proportion of benefit. When both reports are confirmed and the assessment thereby laid, by which the cost of the improvement is to be collected, "a method having been provided by law for payment for the property taken," the city has the right to take the property for public use. If there is any balance of award over assessment coming to the owner of property taken, he must be forthwith paid the same, and if not paid within a reasonable time by reason of negligence in enforcing the collection of the assessment or otherwise, the city is liable to an action for the award, and is chargeable with interest. The system of payment by assessment has been contested in vain through all the courts in the state. It is the usual way of paying for property taken for public improvements, provided by the legislature and upheld by the courts.

After hearing the arguments of counsel, the court, at general term, adopted the above opinion of Judge LOTT, delivered at special term, and quashed the certiorari.

[KINGS GENERAL TERM, December 10, 1866. *Lott, J. F. Barnard and Gilbert, Justices.*]

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### WHITE and CLINE vs. WILLIAMS.

The defendant agreed to sell and convey to W. and C. a lot of land, twenty-six feet six inches in width, being in depth on C. street one hundred and twenty feet "*to and including the stable on the rear of the premises.*" The defendant executed and delivered a deed for the lot, describing it as one hundred and twenty feet in depth, but making no mention of the stable. There was a stable on the rear of the premises, built by a former owner, situated partly upon the said lot, but eleven feet and ten inches thereof were located on the rear of another lot belonging to the defendant. Both parties acted in the erroneous belief that the one hundred and twenty feet so conveyed included the stable, and neither knew that any portion of it was located upon another lot. *Held* that this was not a case for the equitable interposition of the court to

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reform the deed, so as to make it conform, as to the dimensions of the premises, to the previous agreement between the parties. INGRAHAM, J. dissented. A court of equity never grants that relief, except when the mistake is very plain, and operates contrary to the intention of the parties. *Per* CLERKE, J.

**A**PPEAL by the defendant from a judgment ordered at a special term, on a trial before a justice of the court without a jury.

On the 26th day of August, 1863, Philip White and John H. Williams entered into an agreement by which Williams agreed to sell to White and one Samuel Cline, the house and premises No. 26 Rutgers Place, in the city of New York, and described in said agreement as "situated on the corner of Rutgers Place (Monroe street) and Clinton street, fronting on Rutgers Place twenty-six feet and six inches, and being in depth on Clinton street one hundred and twenty feet to and including the stable situated on the rear of said premises, together," &c. for the price or sum of \$12,250, &c. On the 12th of September, 1863, Williams and his wife executed and delivered a deed in which the premises were described as being twenty-six feet six inches in width, front and rear, and as being 120 feet in depth, but no reference was had to the stable, in the description in the deed. On the same day the grantees took possession of the premises, including the stable, and have occupied and used the same ever since. In the winter of 1865, White discovered that the lot from the front line on Rutgers Place, "to and including the stable," was 131 feet and ten inches in depth. He thereupon demanded that Williams should execute a deed of the premises so that the description therein should conform to the description in the agreement, which Williams refused to do. This suit was commenced to compel the execution and delivery of a deed that should conform to the agreement. Samuel Cline, by several mesne assignments, had conveyed his interest in the contract of purchase to the plaintiff Augusta Cline.

The court decided as a matter of fact, that the defendant, in and by said agreement, agreed to convey to the plaintiff to

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the rear of said stable, being to the depth from the front to rear one hundred and thirty-one feet ten inches on Clinton street, and on the westerly side one hundred and thirty-one feet ten and a quarter inches ; and that the said deed of the defendant to the plaintiff was executed and accepted in the mutual belief that the same conveyed the whole of the ground on which said stable stands ; (the defendant excepted to the decision of said justice, that he believed that said deed conveyed any land other than as described in said deed.) And as a conclusion of law the said justice decided that the deed so executed by the defendant should be reformed so as to include the dimensions to the rear of said stable, or that he should execute another deed to the plaintiff for the land under said stable, not embraced in said deed heretofore executed by the defendant ; to which conclusion of law the defendant excepted.

*Francis Byrne*, for the appellant.

*S. Tuttle*, for the respondent.

LEONARD, J. The defendant agreed to sell and convey to White and Cline a dwelling house and lot of land known as number 26 Rutgers Place, being the same premises conveyed to the defendant by Moller, situated on the corner of Rutgers Place and Clinton street, fronting on Rutgers Place twenty-six feet six inches, being in depth on Clinton street 120 feet, "*to and including the stable on the rear of the premises.*" The defendant executed and delivered a deed for the premises, describing it as 120 feet in depth ; but making no mention of the stable. There was a stable on the rear of the premises, built by a former owner, situated partly upon the 120 feet so mentioned, but eleven feet and ten inches of the stable were located on the rear of the lot abutting on the premises so conveyed, which also belonged to the defendant. Both parties acted in the full belief that the 120 feet so con-

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veyed, included the stable, and neither party knew that any portion of it was located upon another lot. Neither party discovered the error until the lapse of several months from the time of the conveyance; but the plaintiffs were in the possession of the stable from the time of the conveyance, in the belief that the whole of it was located on the land so conveyed.

The plaintiff White testified that the defendant said that the stable was on the lot sold. The defendant does not deny this; he, as well as White, having been a witness at the trial; but he testifies that he believed the stable was on the 120 feet; and that he was not aware of the mistake until Mr. White had the lot surveyed; when it was discovered that the stable encroached on his lot in the rear; that he never intended to sell any more than the 120 feet. This evidence was not in any manner contradicted. It fully established the fact that both parties acted in the erroneous belief that the whole of the stable was upon the 120 feet of land conveyed.

The judge found that the defendant delivered and the purchasers accepted the deed in the mutual belief that it conveyed the whole of the stable, and the whole of the ground on which it stood. This may be the fact; but it is not inconsistent with the further fact that such belief was a mistaken one. There is not the slightest pretense of fraud or deceit on the part of the defendant. I am entirely satisfied that both parties acted in ignorance of the fact that the stable was not wholly on the 120 feet conveyed, and in the belief that it was wholly on the said lot described in the deed.

The judgment should be reversed, and a new trial directed, with costs to abide the event.

CLERKE, J. When there is any dispute as to the quantity of land conveyed, no doubt, both course and distance must give way to natural or artificial monuments or objects, and

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courses must be varied and distances lengthened or shortened so as to conform to the natural or ascertained objects or bounds called for by the grant. Consequently, if the deed executed by Williams to White & Cline contained the same description as that in the preceding agreement between these parties, and the former commenced an action of ejectment against the latter for the purpose of dispossessing them of the eleven feet and ten inches in excess of the one hundred and twenty feet, the above mentioned principle would apply ; and he would be defeated. But this is an action in effect to reform a deed, on the ground that it does not conform, as to the dimensions of the premises, to the previous agreement between the parties ; which agreement, both alike admit, was erroneous, so far as it gave the idea that the stable was situated on the quantity of land intended to be conveyed. It is not pretended that White & Cline supposed that they were purchasing more than 120 feet of the premises, in depth ; but, because both parties erroneously supposed that the stable was situated on these 120 feet, they demand that the deed should be reformed, so as to conform to this mistake. This is an application for the equitable interposition of the court ; but, a court of equity never grants the relief required in this case, except when the mistake is very plain, and operates contrary to the intention of the parties.

It is evident that White never thought that he was buying more than 120 feet of land ; indeed long after the execution of the deed, he entered into a negotiation with the defendants purchase the additional eleven feet and ten inches ; the negotiation failed merely because he objected to the price which the defendant asked. In my opinion, instead of being equitable, it would be inequitable to compel the defendant to alter the description in this deed. I concur, therefore, with Mr. Justice LEONARD in thinking that the judgment should be reversed.

INGRAHAM, J. (dissenting.) This action was brought to compel the defendant to deliver a new deed in compliance

with the terms of sale, upon the ground that there was an error in the description of the premises, and claiming that the deed should be reformed.

The agreement described the property as in depth on Clinton street, 120 feet, to and including the stable situated on the rear of the said premises, &c. The deed as given described the premises as "running northerly along the line of Clinton street 120 feet," &c. but omitted the words "including the stable situated on the rear of said premises," as contained in the agreement. The judge found for the plaintiffs, and directed the defendant to execute a new deed conveying, in addition to the former deed, the piece of ground on which the stable stood, being eleven feet ten inches on Clinton street adjoining the former lot.

The contract would have been fully performed by executing a conveyance in the words of the contract, describing the premises intended to be conveyed as they are described therein. The plaintiffs did not purchase by dimensions 131 feet 10 inches, but 120 feet ; but they did agree to purchase a lot of ground 120 feet on Clinton street to and including the stable in the rear of the lot sold. The evidence shows clearly that it was the intent of both plaintiffs and defendant that the stable should pass by the conveyance, and that both supposed the stable stood upon the 120 feet.

There was no fraud committed or intended, but a clear mistake on both sides, and this question must be decided as if the words in the agreement had been inserted afterwards in the deed. If the deed had been so executed, the real question then arises, what would pass under the deed to the plaintiffs ?

The rule governing such cases is thus stated by the Chancellor, in *Wardell v. The People*, (8 *Wend.* 183, 190.) Both courses and distances must give way to natural or artificial monuments or objects, and courses must be varied and distances lengthened or shortened so as to conform to the natural or ascertained objects or bounds called for by the grant.

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And in *Van Wyck v. Wright*, (18 *Wend.* 157, 168,) the Chancellor says: "I consider the law so well settled that a conveyance is to be construed in reference to its distinct and visible location calls as marked or appearing on the land in preference to quantity, course, distance, map, or any thing else, that it would be waste of time to refer to the authorities."

So in *Smith v. McAllister*, (14 *Barb.* 434, 440,) Brown, J. says: "The monuments which shall control course, distance, &c. may be any objects which are visible, fixed, and clearly ascertained as the lands of other individuals, or their courses."

A large number of cases sustaining this principle may be found in Cowen & Hill's Notes, (p. 1378,) and the same rule is stated by Selden, J. in *Baldwin v. Brown*, (16 *N. Y. Rep.* 359,) and he gives the reason, that mistakes are more likely to occur with respect to courses and distances than in regard to objects which are visible and permanent.

In *The People v. Law*, (22 *How. Pr. R.* 109, 111,) Hogeboom, J. says: "In determining the question of intention, I do not think the measurement of the lot is at all a controlling consideration. It always yields to more certain, marked and permanent boundaries."

This rule is so well settled that it is useless to multiply authorities to sustain it; and we have only to ascertain from the description of the premises what the parties intended, so as to dispose of this case. On this point there is no doubt. Both parties admit that they supposed the stable stood upon the 120 feet, and the agreement shows that the stable was considered as included in the boundary and sold thereby. The error was in the measurement, and that error must yield to the visible object—the stable—which is described as forming the boundary on the end of the lot and included as situated on the rear of the lot. The case was properly decided, and the judgment should be affirmed.

New trial granted.

[NEW YORK GENERAL TERM, January 7, 1867. *Leonard, Ingraham and Clarke, Justices.*]

JOHN H. MORE *vs.* JAMES GORDON BENNETT.

Where the words used in an alleged libel *ex necessitate* expose the plaintiff to public ridicule or reproach, no explanation or application of the language employed is required; but when they are at all susceptible of an innocent construction, a complaint alleging that the publication tends to blacken and injure the reputation of the plaintiff and expose him to public hatred, contempt and ridicule, cannot be sustained, without an *innuendo* explanatory of the ambiguous words.

A charge that a *prostitute is under the patronage or protection of the plaintiff* does not necessarily impute moral guilt; and where in a complaint upon such a charge, there was no allegation that the writer of the alleged libel intended to impute such guilt to the plaintiff; it was held that the complaint was fatally defective in not containing an *innuendo*. SUTHERLAND, J. dissented.

Where the words are so ambiguous that they may be understood in an innocent sense, the mere allegation of malicious intention is not sufficient. *Per* LEONARD, J.

The practice of granting new trials at special term by a different judge from the one who heard the cause at the circuit, for legal error on the trial, condemned. *Per* LEONARD, J.

**A**PPEAL from an order made at a special term dismissing the plaintiff's complaint. The action was for an alleged libel published in the New York Herald, of which the defendant is the proprietor. It is contained in a letter from the widow of a Colonel Kimball, which was published in that newspaper. The writer, after referring to certain matters relating to her deceased husband, says: "Among the papers referred to, as returned to me, are my own private letters scattered indiscriminately among the others, and returned to me after being in the hands of a prostitute. *And* in her hands, too, are other household relics that are sacred to my wife. I find that I cannot obtain them except through a long litigation by the public administrator. The police have called upon this woman, and she refuses to give up any thing belonging to my husband. *She is, I understand, under the patronage or protection of a Mr. More, agent of the Central Railroad, who has also employed the orderly of my late husband.*"

The complaint alleged that the publication referred to the

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plaintiff, and that he was thereby charged with having under his patronage or protection a public prostitute ; that it was false, malicious, and tended to injure his reputation, and expose him to public hatred and contempt. The complaint was dismissed, at the trial, after the evidence for the plaintiff was concluded, upon the ground that it did not state facts sufficient to constitute a cause of action.

CLERKE, J. Undoubtedly our law, like the Roman law, recognizes a very marked distinction between spoken slander and slander communicated by pictures or signs or writing, or printing, or that published in books or newspapers. Matter calculated to cast ridicule on a man, or to degrade him in the opinion of his acquaintances, or of the community, is libellous, if written or printed and published ; although, if only spoken, it may not be actionable. For instance : to accuse a man, orally, of being a liar, even in the presence of hundreds, is not actionable, *per se* ; but to say of him in an article published in a newspaper, that he is a liar, is actionable ; and no proof of special damage is necessary. (*Brooks v. Bemiss*, 8 *John*. 455.) A general oral charge of having sworn falsely, without reference to material evidence given by the plaintiff on the trial of a cause, is not actionable in itself ; but it is actionable to print and publish the following words concerning a man : " Our army swore terribly in Flanders, said Uncle Toby ; and if Toby were here now, he might say the same thing of some more modern swearers ; the man (meaning the plaintiff) is no slouch at swearing to an old story." (*Steele v. Southwick*, 9 *John*. 214.)

But the printed matter must necessarily be calculated to cast ridicule on a man, or to degrade him in the opinion of his acquaintances, or of the community. Where the language is ambiguous, or where it affirms what is consistent with freedom from moral guilt, an allegation that the publication tends to blacken and injure the reputation of the plaintiff,

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and expose him to public hatred, contempt and ridicule, cannot, I think, be sustained without an innuendo.

The charge in the case before us, that a prostitute was under the patronage or protection of the plaintiff, does not necessarily impute moral guilt; and there is no allegation in the complaint that the writer of the letter intended, in this communication, to impute such guilt to the plaintiff. However improbable, it is very possible, that the "protection" of which the writer speaks, may be such as the benevolent often grant to the most erring and debased. At the present day, there are benevolent and pious persons, not a few who, dismayed at the alarming increase of abandoned women, become their friends, protectors and patrons, with the hope of reclaiming and redeeming them from the horrors and pollution of their condition. It is not impossible that the patronage and protection, of which the writer of the letter in the Herald speaks, may be the result of similar benevolence. I think that the complaint was fatally defective in not containing an *innuendo*, explanatory of these ambiguous words.

The rule is, where the words, *ex necessitate*, expose the plaintiff to public ridicule or reproach, no explanation or application of the language, used in the alleged libel, is required; but when they are at all susceptible of an innocent construction, such explanation or application must be added, by what pleaders call an *innuendo*, or colloquium, and in some cases by both. Among many cases, to which I could refer, I mention *Capel v. Jones*, (4 *Man. G. & Scott*, 259; 56 *Eng. C. L.* 252.) See also *Hunt v. Bennett*, (19 *N. Y. Rep.* 173.)

The order of the special term should be reversed, with costs.

LEONARD, J. The Code authorizes the complaint to be dismissed at any time, if the pleader does not state facts sufficient to constitute a cause of action. It is not usual in such cases to allow an amendment, if the defect is technical, and will not operate as a surprise. It is in the discretion of the

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judge, at the trial, whether to refuse or allow the amendment, and no ground of exception arises for his refusal to allow such amendment. It is discretionary.

The question now comes up in the same manner as if it had arisen upon demurrer to the complaint. The objection taken is not waived by answering the complaint. (*Code*, § 148.)

The objectionable words in this case are actionable or otherwise, according to the manner in which it was intended they should be understood. The mere allegation of malicious intention is not sufficient where the words are so ambiguous that they may be understood in an innocent sense. My brother CLERKE has well explained the double sense in which the words complained of may be accepted. We are not to take the worst or most injurious sense, when the words may properly and naturally receive a harmless, as well as an offensive, construction. (*Button v. Hayward*, 8 *Mod.* 24. *Holt v. Scholefield*, 6 *Term R.* 691.) What was it the intent of the publication to charge the plaintiff with having committed of an injurious or offensive nature in the public estimation? The pleading does not state. Are the courts to seek for it? Surely not. It was the office of the pleading to characterize the intent, so that the defendant might take issue upon it. Had it been alleged by the complaint that the intent of the publication was to charge the plaintiff with keeping a prostitute for illicit purposes, the defendant might, by a denial, have raised an issue properly to be tried by the jury. Some such interpretation must be put upon the words before they become libellous, and it is the office of the complaint to do so in a case where the words have an ambiguous sense. There are several strong authorities which illustrate this view. In *Dolloway v. Turrill*, (26 *Wend. R.* 383,) the publication charged the plaintiff with having officially certified that an affidavit was sworn to before him, by the person signing it, when no oath was in fact administered. At the trial the court refused to submit to the jury the question of fact, in what sense the words were used, it being insisted by the defendant

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that they imported only a charge of inadvertence on the part of the plaintiff. The judge charged that the words contained a charge of official corruption, and that it was only necessary to consider whether the defendant was guilty of the publication. It was held in the late court of errors that the judge erred in these respects. The fact of the certification did not, by itself, prove corruption in office. The charge was open to a harmless construction.

In *Capel and others v. Jones*, (56 Eng. Com. L. 258,) a publication charging the plaintiff with purchasing two hundred railway shares under a false representation of the market, without any innuendo connecting the plaintiff with the false representation, was held not to be actionable. Numerous other illustrations were cited upon the points of counsel, but these are, I think, sufficient.

The allegation that the publication was malicious, is not sufficient. It is the meaning and intention that constitute the malice. These depend upon the sense in which the words were used ; and where they are ambiguous, the sense in which they become libellous must be stated. Where the libellous words are not ambiguous, they require no statement or explanation to show their application or meaning.

The judge, at special term, must have granted a new trial upon the ground that the judge at the circuit committed an error in his interpretation of the alleged libel. It could not have been for the refusal to permit an amendment, I think, as that is discretionary.

The practice of granting new trials at special term by a different judge from the one who heard the cause at the circuit, for legal error at the circuit, is of very doubtful propriety, and has never been the practice in this district. Errors of law committed by one judge are more properly to be reviewed at the general term. It ought not to be assumed that one judge has any better knowledge of the law than another. If any other rule were to prevail, the judge having, in fact, the least knowledge, as well as the least delicacy, might, at

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special term, reverse a multitude of verdicts taken at the circuit before another judge more learned than himself. In the present case, I think the judge at the circuit was right in his law ; and that is the only question under review.

I concur with Judge CLERKE, that the order of the special term should be reversed, with costs, and that the defendant be at liberty to enter judgment upon the direction of the judge at the circuit, dismissing the complaint, with costs.

SUTHERLAND, J. dissented.

Order reversed.

[NEW YORK GENERAL TERM, JANUARY 7, 1867. *Clerke, Leonard, and Sutherland, Justices.*]

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NUNNEMAKER and ALLEN vs. LANIER, survivor, &c.

The defendants received from the plaintiffs, for collection, a draft drawn by a bank upon the Ohio Life and Trust Company, and on presenting the same to the company, at its office in New York, they received in payment the check of the trust company upon a bank, and surrendered the draft. The defendants neglected to present the check of the trust company on the day they received it, and before banking hours of the next business day the trust company suspended payment, and its check was dishonored, on presentation. *Held* that the defendants having surrendered the draft, assumed the responsibility of taking the check of the drawee in payment. And that the existence of a custom, in the city of New York, among business men, to take the checks of the trust company without certification, in the same manner as bank checks, afforded no defense to an action by the plaintiffs to recover the amount of the draft.

**A**PPPEAL by the defendant from a judgment entered upon the report of a referee.

*J. E. Burrill*, for the appellant.

*P. Y. Outler*, for the respondents.

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*By the Court*, LEONARD, J. The defendant's firm, Winslow, Lanier & Co. received from the plaintiffs a draft drawn by the Dayton Bank upon The Ohio Life Insurance and Trust Company, for \$800, for collection. Messrs. Winslow, Lanier & Co. presented it to the Trust Company at the office of their agency in New York, and received in payment the check of the Trust Company, drawn upon the American Exchange Bank, and surrendered the check which they held for collection. The defendants neglected to present the check received by them from the Trust Company on the day they received it, although there was sufficient time to do so during banking hours; and all checks of the Trust Company presented that day were duly honored by the said bank. The Trust Company suspended payment, and their insolvency and suspension was publicly known before banking hours on the next business day. The check of the Trust Company was dishonored upon presentation, and the defendants then demanded a return to them of the draft of the Dayton Bank, but were unable to procure it, and the Trust Company had in fact cancelled it after they had drawn and delivered their check upon the American Exchange Bank, in the same manner as in the case of paid checks.

The defendants rely upon the existence of a custom in the city of New York among business men to take the checks of the Trust Company without certification, in the same manner as bank checks, and insist that having done the business of collecting for the plaintiffs for a very small commission only, in the customary way prevailing at that time, they cannot be held liable for an imputed negligence in this case.

Unless a different rule prevails in respect to corporations doing a banking business from that applied to the case of private bankers, I am unable to perceive that the custom relied on affords any defense.

The defendants having surrendered the draft of the Dayton Bank, assumed the responsibility of taking the check of the party upon whom the draft was drawn in payment. This

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was done without the knowledge or authority of their correspondents. The act was their own, relying upon the assumed responsibility and wealth of the Trust Company. It is no excuse that they and others were in the habit of taking similar risks.

The defendants insist that the check of the Trust Company is not a payment, and that the plaintiffs can still resort to the Dayton Bank, the defendants having caused notices of protest to be served, as they claim, in due season. The fact may be so. It may be that the plaintiffs could have maintained an action against the Dayton Bank. It is not certain, however. The right to maintain such action might have depended upon the state of the accounts between the Trust Company and that bank, and whether the Dayton Bank would sustain any loss by reason of the cancellation and supposed payment of their draft before receiving notice of its dishonor. The plaintiffs cannot be compelled to resort to a doubtful remedy against another party.

There were some objections taken to the admission of evidence of an immaterial character, which might have been very properly excluded, but none of the evidence so admitted affected the result. The evidence related to the entries in the account books of the Trust Company; but no fact appears to have been found by the referee based upon such evidence. The facts found by the referee are nearly all of them stated by the defendants in their answer.

The judgment should be affirmed with costs.

[NEW YORK GENERAL TERM, January 7, 1867. *Leonard, Ingraham and Clarke, Justices.*]

## HOLMES and others vs. CLARK and others.

A conveyance made to children, for love and affection, is not fraudulent or void against subsequent creditors if, at the time of the conveyance, the grantor had sufficient property, otherwise, to pay then subsisting debts.

Such a conveyance would be void as to existing creditors at the date of the conveyance, if their debts were not otherwise paid.

It is not necessary that the grantee should be a participator in the fraud, to avoid the deed. Though he may have received the conveyance honestly, and in ignorance of the fraud, the conveyance may be void.

If the grantee, without knowledge of the intended fraud, becomes the purchaser for value, he should be protected, although the grantor acted from fraudulent motives.

A grant made without other consideration than love and affection cannot be set aside in favor of creditors not being such until two years after the conveyance; unless the transaction was fraudulent as between the parties, and made to defraud subsequent creditors.

Where the facts, as stated in the plaintiffs' opening, were that the conveyance sought to be set aside was made by the grantor, to her infant children, in 1861; that A. and M. were creditors of the grantor, at the time of the conveyance, and as such had obtained a judgment declaring the conveyance void as to them; that the indebtedness of the grantor, to the plaintiff, did not exist until the close of 1868; and there was no allegation of insolvency, other than as to A. and M., and none that it continued until the debt to the plaintiffs was contracted; *Held* that the judge properly dismissed the complaint.

*Held, also*, that the plaintiffs should have shown either that their claim was for a subsisting indebtedness, or that the conveyance was made with intent to defraud subsequent creditors, which was to be inferred from the proof of fraudulent intent on the part of the grantees as well as of the grantors.

**A** PPEAL from a judgment ordered at the circuit, dismissing the complaint. The action was brought to set aside a conveyance as fraudulent.

INGRAHAM, J. My conclusions upon this case are :

1st. That a conveyance made to children for love and affection, is not fraudulent or void against subsequent creditors, if at the time of the conveyance the grantor had sufficient property otherwise to pay then subsisting debts.

2d. That such conveyance would be void as to existing

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creditors at the date of the conveyance, if their debts were not otherwise paid. (*Harlem R. R. Company v. Kyle*, 5 Bosw. 587.)

3d. That it is not necessary that the grantee should be a participator in the fraud, to avoid the deed. He may have received the conveyance honestly, and ignorant of the fraud, and yet the conveyance might be void.

4th. If the grantee, without knowledge of the intended fraud, becomes the purchaser for value, he should be protected, although the grantor acted from fraudulent motives.

5th. That a grant made without other consideration than love and affection, cannot be set aside in favor of creditors, not being such until two years after the conveyance, unless the transaction was fraudulent as between the parties, and made to defraud subsequent creditors. (*Tappan v. Butler*, 7 Bosw. 480. *Seward v. Jackson*, 8 Cowen, 406. *Carpenter v. Roe*, 10 N. Y. Rep. 227. *Van Wyck v. Seward*, opinion of *Maison*, 18 Wend. 406.)

The facts, as stated in the plaintiff's opening, are that the conveyance was made by the grantor to her infant children in 1861. That Aitken & Miller were creditors of the grantor at the time of the conveyance, and as such had obtained a judgment declaring the conveyance void as to them. That the indebtedness of the grantor to the plaintiff did not exist until the close of 1863, for which judgment had been obtained. There was no allegation of insolvency, other than as to Aitken & Miller, and none that it continued until the debt to the plaintiffs was contracted. (*Savage v. Murphy*, 34 N. Y. Rep. 508.)

On these facts, as stated in the opening, the judge dismissed the complaint. I think his ruling was correct, and should be affirmed. The plaintiffs should have shown either that the plaintiffs' claim was for a subsisting indebtedness, or that the conveyance was made with intent to defraud subsequent creditors, which is to be inferred from the proof of

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fraudulent intent on the part of the grantees as well as of the grantors.

The judgment should be affirmed.

CLERKE, J. concurred.

LEONARD, J. In this case the complaint was dismissed on the opening statement of the plaintiffs' counsel, without evidence having been taken.

The complaint alleges that the judgment debtor was insolvent at the time of the conveyance to her children in 1861. The answer denies it, and alleges that she had a large surplus beyond the amount, sufficient for the payment of existing creditors. The plaintiff did not become a creditor until two years after this conveyance. The judge, at special term, has not found the facts on this issue, and it does not appear from the case how the fact was.

As I understand the rule, a conveyance is not necessarily to be held fraudulent as to subsequent creditors, unless the grantor was embarrassed by debts which she had not the means of paying. If the grantor was insolvent, and the conveyance has been declared void as to existing creditors, then the equity is considered as extending to subsequent creditors, who are then let in to obtain satisfaction out of the proceeds of the property sold to satisfy the demands of creditors existing at the time of the conveyance.

A gift to children, as in the present case, may be free from an intent to hinder or delay subsequent creditors, when the grantor was the owner of sufficient property to pay existing debts, and show a considerable surplus.

I think the judge was clearly wrong, however, in dismissing the complaint upon the abstract ground that the deed could not be void where the grantees did not commit a fraud in accepting it, and were ignorant of the fraudulent intent of the grantors. It will be void or valid according to the facts ;

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but there is no evidence affecting the question here, so as to render the deed clearly valid, as held by the judge. (1 *Story's Eq.* §§ 361, 2. *Reade v. Livingston*, 3 *John. Ch.* 481.)

There was no occasion to make Aitken & Miller parties to the action.

The judgment should be affirmed as to them, with costs, but reversed as to the other defendants, and a new trial be ordered, with costs to abide the event.

Judgment affirmed.

[NEW YORK GENERAL TERM, January 7, 1867. *Leonard, Clarke and Ingraham, Justices.*]

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THE TRIBUNE ASSOCIATION *vs.* THE MAYOR, &C. OF THE  
CITY OF NEW YORK.

The act of the legislature of 1866, (*Laws of 1866, vol. 2, p. 2070, § 10.*) which provides that no judgment in actions upon contracts shall be entered by default or otherwise, in any court, against the corporation of New York, "except upon proofs in open court that the amount sought to be recovered in said judgment still remains unexpended in the city treasury to the credit of the appropriation to the specific object or purpose upon which the claim sued for is founded," applies to actions commenced prior to its passage, as well as to those thereafter to be commenced.

It is competent for the legislature to repeal an existing law, absolutely, or continue it in force, as to proceedings commenced under it, or to substitute a new law in its place and direct that all future proceedings in the progress of an action shall be governed by such new law.

The act of 1866 does not affect the contract. It does not apply to the *debt*, but to the *remedy*. It delays the plaintiff's recovery until an appropriation to cover the claim is made.

Where, in an action against the corporation of New York, for work and labor, the defendants in their answer, admit the performance of the work and labor, and that a sum specified is due, the plaintiff will not be allowed to take judgment for the amount admitted to be due, unless evidence is furnished that a sufficient amount of the appropriation to the specific object, to pay the claim, remains unexpended, at the time of the application.

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Tribune Association v. The Mayor &c. of New York.

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THIS action was brought to recover for publishing the proceedings of the common council, and reports of the city inspector, amounting to twenty-two hundred and thirty-eight dollars. The defendants, in their answer, admit that the plaintiffs did publish the proceedings of the common council, and that such publication was worth the sum of seventeen hundred and twenty-four dollars. The plaintiffs moved at special term for an order directing judgment to be entered against the defendants for the amount admitted in the answer, with interest and costs. Proof was furnished that the amount of the work had been performed, and that the sum claimed was due, but no evidence was furnished that a sufficient amount of the appropriation to this specific object to pay this claim, remained unexpended at the time of the application. The motion was denied, and the plaintiffs appealed.

*J. W. Edmonds*, for the appellants.

*R. O'Gorman*, for the respondents.

INGRAHAM, J. In ordinary cases the motion was proper, and should be granted. The admission, in the answer, of the amount and value of the work done, established that the plaintiffs' claim was valid and ought to be paid. The only question then arises as to the force of the provisions of the act of 1866, which provides that "no judgment in actions upon contract shall be entered by default or otherwise, in any court, against said corporation, except upon proofs, in open court, that the amount sought to be recovered in said judgment still remains unexpended in the city treasury to the credit of the appropriation to the specific object or purpose upon which the claim sued for is founded." (*Laws of 1866*, p. 2070, § 10.)

It is sought to evade the operation of this act by urging, first, that the act does not apply to actions commenced prior

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to its passage, and was intended to operate only in the future. The answer to this is, that it is not made applicable to actions, but to judgments, and the words of the act are general, that no judgment shall be entered in any court, in actions upon contract. The provision is general, so as to prohibit the entry of any judgment. The statute makes no exception, and can only be complied with by including pending actions as well as actions thereafter to be commenced.

2d. It is urged that the act cannot have any retrospective effect. In *Bates v. Stearns*, (23 *Wend.* 482,) relied on by the plaintiffs, the judgment had been recovered, and the question was whether it should be a bar; and that case properly held that it had no more force after the amended statute than before it was passed. In *The People v. Livingston*, (6 *Wend.* 526,) Savage, Ch. J. says: "It is undoubtedly competent for the legislature to repeal absolutely, or to continue, the old law in force, as to the proceedings commenced under it, to substitute another law in place of the old one, and to direct that all future proceedings in the progress of a cause or the prosecution of a right, shall be governed by such new law."

It is further urged that though the act be retrospective, it could not take away a right of action which the party had before the statute; and that no statute can act retrospectively unless such be its clear intention, and such intention was expressly declared, or the statute could find no other aliment. That such has always been the law must, I think, be conceded, and such was the decision in this court in *Meyer v. Roosevelt*, (25 *How. Pr.* 97.) But that case was reversed in the Court of Appeals, and the act held to be constitutional and valid, and its operation was applied to the payment of a debt contracted long before the passage of the statute. That decision will admit of no other construction than one adverse to such a rule. The question, however, in this case, can hardly be said to be one in which the contract

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can be affected by the statute. It does not apply to the debt, but to the remedy. It delays the plaintiffs' recovery until an appropriation is made, to cover the claim.

The order should be affirmed.

CLERKE, J. I concur in the conclusion, on the ground that a similar provision to the one in question was contained in the charter of 1857, and that the indebtedness was incurred subject to that provision.

LEONARD, J. also concurred.

Order affirmed.

[NEW YORK GENERAL TERM, January 7, 1867. *Leonard, Clarke and Ingraham, Justices.*]

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 THAYER vs. CLARK, impleaded, &c.
 

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The plaintiff brought suits against A. and P., as administrators of N. A. deceased, for services rendered to N. A., and recovered judgments. He then applied to the surrogate, for an order that A. and P. pay such judgments out of the estate of the intestate, and an order was made by the surrogate, directing the payment by A. and P. within five days. Payment was not made, and the decree being docketed in the common pleas, an execution was issued from that court, against the administrators. This not being paid, the surrogate, on application made to him, assigned to the plaintiff the official bond given by the administrators. In an action upon such bond, against the sureties, *Held* that the proceedings of the plaintiff were regular; and that the action was well brought.

*Held, also*, that the decree of the surrogate was conclusive upon the administrators. That if they had any defense it should have been made in that proceeding.

That the surrogate's decree established the indebtedness of the estate to the plaintiff; and when that was established by the decree of a competent tribunal the administrators were bound to pay it. And that on their neglecting to do so, the bond which they gave as administrators, with sureties, was forfeited.

The sureties in such a bond have no right to go back of the decree of the surrogate directing the payment of a debt, by the administrators, and show

48	248
122a	639
48	248
63h	416
48	248
122a	201

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that such decree was erroneous. It is conclusive as to the indebtedness of the estate, and as to the obligation of the administrators to pay it. The act of 1837, authorizing the assignment of an administrator's bond, to a creditor, by the surrogate, where an execution issued upon his decree should have been returned unsatisfied, and the prosecution of such bond by the creditor, (*Laws of 1837, ch. 460.*) applies to *any* decree made by the surrogate for the payment of money, by an administrator, and not merely to a decree for a general accounting by him.

THIS was an action upon a bond given by Sidney Allen, Alvah Phelps, Jacob Loomis and Albert Clark, for the faithful administration by Allen and Phelps, of the personal estate of an intestate, Nahum Allen, deceased. It was tried before H. W. Robinson, referee, on the 7th day of October, 1864. Clark was the only defendant who appeared. The following are the material facts of the case as proved on the trial: On the 23d day of February, 1858, letters of administration were granted by the surrogate of the county of New York, to Sidney Allen and Alvah Phelps. To obtain these letters they executed a bond, together with Jacob Loomis and Albert Clark, in the penal sum of thirty thousand dollars, conditioned, that they should faithfully execute the trust, and *also should obey all orders of the surrogate of the city and county of New York*, touching the administration of the estate committed to them. On the 22d day of April, 1862, the plaintiff presented his petition to the surrogate, setting forth that he was a judgment creditor of Nahum Allen, deceased. That letters of administration on said estate had been granted by the surrogate of the county of New York, to Allen and Phelps, more than four years prior to said application, and that said administrators had not filed their account, and praying that a citation issue, requiring them to account before said surrogate, and show cause why the judgments of the petitioner, against the said estate, should not be paid. Thereupon, the surrogate made an order requiring the administrators to appear before him on the 30th day of May, then next, and show cause why the judgments of the said petitioner should not be paid. On the 23d day of May, 1862, a copy of the above

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order was personally served upon each of said administrators. On the day appointed, the administrators appeared before the surrogate, and after hearing the proofs and allegations of the parties in the premises, and *it having been proved that there were assets in the hands of said administrators, more than sufficient to pay all debts, claims, and demands, against the estate of said deceased*, the surrogate ordered that said Allen and Phelps, as such administrators, pay within five days thereafter, to said Thayer, the judgment creditor, the amount of his several judgments, with costs and disbursements, amounting in all to \$1842.70. The certificate of the surrogate, stating the names of the parties against, and in favor of, whom the decree was made, with the trade, profession and occupation of the parties, their places of residence, and the amount of debts and costs directed to be paid by such decree, was filed and docketed in the county clerk's office, of the county of New York, on the 26th day of November, 1862. An execution was issued thereon, on the 28th day of November, 1862, against Sidney Allen and Alvah Phelps, (*see 5 Hill, 504,*) and returned unsatisfied. On the 7th day of January, 1863, the surrogate made an order assigning the bond to the plaintiff for the purpose of being prosecuted, in pursuance of said assignment. This action was brought on the 30th day of July, 1863.

The plaintiff then proved the omission and refusal of said administrators to perform the decree for the payment of said debt to the plaintiff, and rested his case.

The defendant then offered to prove by the administrators that they were never sued, and never authorized an attorney to appear for them in the actions in which the plaintiff's judgments were obtained. Also, payment by Nahum Allen, deceased, of \$445, and offered in evidence five receipts, in the hand writing of the plaintiff, or his law partner. The plaintiff objected to the admission of the evidence, and the referee sustained the objection, holding that the surrogate's decree was conclusive proof as to the indebtedness of the estate, and that

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said decree was final; to which ruling the defendant duly excepted. The defendant then moved to dismiss the complaint, on the following grounds: *First*. That the decree, or two orders, of the surrogate, on which this action is founded, are without authority in law, and are void, and consequently the plaintiff has no right to sue or recover on the bond.

*Second*. That no proper foundation had been laid for any proceedings on the bond of the administrators.

The referee denied the motion, and reported in favor of the plaintiff for the sum of \$2281.06, to which the defendant excepted. And judgment being entered in favor of the plaintiff for \$2488.97, damages and costs, the defendant appealed.

*F. G. Young and J. W. Edmonds*, for the appellant.

I. The remedy taken in this case, by suing the bond of the administrator, is erroneous, and not warranted by statute. The plaintiff obtained three judgments in the Supreme Court against the administrators of Nahum Allen, payable out of assets, and not out of individual property of the administrators. He applied to the surrogate for leave to issue executions, and on applying for such leave, necessarily cited the administrators to account. It is alleged that they accounted, and the surrogate ordered the administrators to pay, and awarded execution against their individual property. The execution was issued, not against assets, but against individual property of administrators. On return of *nulla bona* the bond was assigned to the plaintiff, and this suit brought. The citation to show cause why execution should not issue was a proceeding under the Revised Statutes, to enforce the collection of judgments in another tribunal, yet the subsequent proceedings were under the act of 1837. The two proceedings provided by these statutes are distinct and different, and for entirely different purposes, and the plaintiff's error has been in commingling them, as if all designed for the same purpose.

I. *As to the proceedings under the Revised Statutes.* Before the Revised Statutes an administrator could be sued at any time, and the first execution would be satisfied out of assets liable to execution. The Revised Statutes intended to destroy that preference. (*Revisers' Notes*, 5 *N. Y. Stat. at Large*, 380.) They did that by sections 31, 32, 2 Revised Statutes, § 88. (2 *N. Y. Stat. at Large*, 90. *Id.* 120, § 20.) Such is the construction put upon the statutes by the court. (*Dudley v. Griswold*, 2 *Bradf.* 30. *People v. Albany Mayor's Court*, 9 *Wend.* 488. *Dox v. Backenstose*, 12 *id.* 542.) Several important principles are established by those cases: (1.) A judgment now has no preference, but must abide the course of distribution. (2.) The surrogate has no concern with the individual property of the administrator, but with property of deceased persons only. (3.) When an administrator is personally liable—even for costs—there is no need of applying to the surrogate for leave to issue execution. Leave is grantable only when the execution is against the assets. (4.) Where leave is applied for and granted, the execution is out of the court where the judgment is. Hence it is that if permission is granted, and there are assets *liable to execution*, the judgment becomes as effective as in any other case. But if permission is not granted, and there are no *such* assets, then the whole effect of obtaining the judgment is proving the debt. If the judgment is against the administrator personally, and not against the assets, either in whole or in part, for debt or costs, the surrogate has nothing to do with it. No permission to issue execution is needed. In both cases the creditor's only remedy is on final distribution, when he shares with all others of the same class.

II. *As to the remedy under the act of 1837, as amended in 1844.* (4 *N. Y. Stat. at Large*, 498, §§ 63–65.) Under the Revised Statutes the surrogate was given power to have a final accounting and decree payment. (2 *N. Y. Stat. at Large*, 94, § 52; 96, § 61; 98, § 70; 120, § 18; 229, § 1.) The only mode provided by the Revised Statutes for enforce-

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ing a decree on such final accounting was by attachment. (2 *N. Y. Stat. at Large*, 230, § 6. *Dakin v. Hudson*, 6 Cowen, 224. *Seaman v. Duryea*, 11 *N. Y. Rep.* 324. *S. C.* 10 Barb. 528.) By an act passed in 1830, a further mode was provided, for enforcing surrogates' decrees on final accounting, and that was by suing the administrator's bond. (*Laws of 1830, chap.* 320, § 23. 2 *N. Y. Stat. at Large*, 120, § 19, *a.*) In 1837, a still further remedy was provided by a general act in relation to surrogates' courts generally, and providing only a mode of enforcing a surrogate's decree on final accounting. (*Laws of 1837, ch.* 460, §§ 63, 64, 65. 4 *N. Y. Stat. at Large*, 498.) That remedy was by docketing the decree in the county clerk's office, issuing execution out of the common pleas, and assigning the bond. The proceedings on the bond under the act of 1830, were by suit by the surrogate, in the name of the people. The proceedings under the act of 1837, were by suit in the name of the assignee. In the former case, the surrogate collected the whole bond and distributed it as assets. In the latter case, the party sued in his own name and recovered only what was due to him. Thus the object of the statutes to destroy preferences, and put all of the same class on an equality is provided for. (1.) The creditor may sue and obtain judgment, and thus prove his debt. (2.) The surrogate may permit him to issue execution against assets, *but only for his proportion of such assets*, and not for the whole amount of his debt. (3.) If the surrogate refuse permission, or there are not enough of assets liable to execution, the judgment creditor must, like all other creditors, wait for a final accounting and distribution. (4.) If on such final accounting there are assets enough to pay all, a decree is made for that; if assets enough only to pay part of all the debts, a decree is made for a proportional distribution. (5.) Such decree is enforced by docketing the decree, issuing execution out of the common pleas, and on return of *nulla bona* such creditor taking an assignment of the bond, and recovering the amount of

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his debt. The system is complete and simple, effecting the object of equality among creditors, ultimate payment to the creditor of the amount of assets, and the ultimate personal liability of the administrator and his sureties to that extent. The plaintiff has made several departures from this mode of proceeding. (1.) He has in all his judgments obtained costs against the administrators personally, and for that he has not issued any execution out of the Supreme Court, where his judgments were obtained. (2.) He has never issued any execution for his debt against the assets out of the Supreme Court. (3.) He applied for leave to issue such executions—that is, executions on his judgments, out of the court in which they were obtained. (4.) He never obtained such leave, but, using the machinery provided for a final accounting, issued out of the common pleas one single execution for the amount of all three judgments. (5.) After presenting his petition for leave to issue his three executions out the Supreme Court, he proceeds, *ex mero motu*, to treat the whole thing as a final accounting. (6.) On the accounting which was had he cited only the administrators. No citation to other creditors as required by law. (2 *N. Y. Stat. at Large*, 96, § 60.) (7.) The decree that he obtained was against the administrators personally, and not against the assets. (8.) The execution that he issued was against the administrators personally, and not against the assets. (2 *N. Y. Stat. at Large*, 376, § 3.) (9.) This decree and execution are against both administrators, Allen and Phelps: *non constat* that Allen ever received a dollar of the assets, but Phelps had it all, and the bond sued was security for Allen only, and not for Phelps at all. (10.) And he makes the surrogate deal with the individual property of Phelps and Allen, and not with the assets in their hands as administrators. To determine whether they are thus personally liable, is entirely without the surrogate's jurisdiction, and belongs exclusively to another forum. (1.) In his judgments in the Supreme Court, the plaintiff recovers some \$400 of costs, without any compli-

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ance with the statute. (2 *N. Y. Stat. at Large*, 72, § 41. 2 *R. S.* 90.) (2.) He then makes the Surrogate's decree a personal liability for the principal and interest of his debt. If these proceedings can be sustained, then may a prosecuting creditor, (1.) Recover costs without the adjudication of the court. (2.) Enlarge the jurisdiction of the surrogate over the property of the living. (3.) And cut off all other creditors by a proceeding without notice to them, from having any benefit from an administrator's bond. (4.) And all this against a surety, without notice to him of any of the proceedings.

II. The referee held, that the decree of the surrogate, ordering the money paid, was conclusive on the parties to this suit, and therefore he excluded the evidence of payments by the intestate, and the records of the judgments in the Supreme Court. In this he erred. 1. None but parties or sureties are concluded by a judgment, and the sureties are concluded only when they have had notice of the suit, and an opportunity to defend. (*Thomas v. Hubbell*, 15 *N. Y. Rep.* 405. *Tyler v. Ulmer*, 12 *Mass. R.* 166. 1 *Green. Ev.* §§ 522, 523, 535.) 2. It is only when one has agreed to be bound by the event of a suit, that he is concluded by the judgment, though not a party to it. (*Westervelt v. Smith*, 2 *Duer*, 449. *Turpin v. Thomas*, 2 *Hen. & Munf.* 139, 147. 2 *Cowen & Hill's Notes to Ph. Ev.* 816, 817.) 3. For the purpose of establishing the fact that a judgment has been rendered, it is conclusive. But with reference to any fact, upon whose supposed existence the judgment is founded, it may be *res inter alios*, and not conclusive. (2 *Cowen & Hill's Notes*, 821.) This is particularly true of judgments in the surrogate's court. (*Dakin v. Hudson*, 6 *Cowen*, 224. *Ford v. Walsworth*, 15 *Wend.* 449. 2 *R. S.* 91, § 65. *Id.* 116, § 21. *Simkins v. Cobb*. 2 *Bail. S. O.* 60. *Weston v. Weston*, 14 *John.* 428.) 4. The evidence rejected would have established the following facts: (1.) That the bills rendered to the administrators, were different from, and less than,

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those recovered on. (2.) That in one of the suits no process was served on the administrators, but an attorney voluntarily appeared for them (no authority for doing so being shown.) Such an appearance, without authority shown, is not binding. (*Campbell v. Bristol*, 19 *Wend.* 101. *Allen v. Stone*, 10 *Barb.* 547.) (3.) Costs were taxed by consent of the attorneys, and by an award of the referee, and not by award of the court. (2 *R. S.* 90, § 41. 2 *N. Y. Statutes at Large*, 92. *Buckhout v. Hunt*, 16 *How.* 408.) (4.) On the trial before the referee, payments by the intestate were excluded and disallowed. (5.) The statute of limitations was waived by the attorneys. (6.) That the claim on which the plaintiff sued was a joint one belonging to himself and partners, and no transfer to him was shown. All these were valid objections to the recoveries against the administrators, and it was competent for their sureties to set them up in a suit on their bond.

*B. C. Thayer*, respondent, in person. I. The referee properly excluded the other evidence offered by the defendants, upon the ground that the surrogate's decree was conclusive proof as to the indebtedness of the estate; that said decree is final, and cannot be impeached in any collateral proceeding. (*The People v. Downing*, 4 *Sandf. R.* 189. *Baggott v. Bulger*, 2 *Duer, R.* 160 and 169. *The Supervisors of Onondaga v. Briggs*, 2 *Denio's R.* 33. *The People v. Laws*, 3 *Abb. R.* 450. *Affirmed*, 4 *Abb. R.* 292. 4 *Bosw.* 379 and authorities there cited.) 'In a suit on a judgment, or decree, no matter of defense can be pleaded, or proven, which existed anterior to the decree. (*Biddle v. Wilkins*, 1 *Peters' R.* 686 and 692.)

II. The defendants' motion to dismiss the complaint was properly denied. Power is conferred upon the surrogate to inquire into the condition of the assets, and decree the payment of debts, against the administrator of deceased persons, at the instance of a creditor, at any time after six months shall have elapsed from the granting of the letters of adminis-

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tration. As to the mode of enforcing debts against an estate, see *Dayton's Sur. ed. of 1855, p. 342, ed. 1861, p. 373. 3 Revised Statutes, 5th ed. p. 204, Dec. 18. Fitzpatrick v. Brady, 6 Hill, 582. Butler v. Hempstead, 18 Wend. 668. Kidd v. Chapman, 2 Barb. Ch. 414. Mitchell v. Mount, 19 Abb. 1. 31 N. Y. Rep. 356. 6 Barb. 356. 24 id. 60.*)

As to the mode of enforcing the surrogate's decree.

III. "After any decree is made by a surrogate for payment of money by an administrator, on application, he shall make out a certificate, stating the names of the parties against and in favor of whom the decree is made, with the trade, profession or occupation of the parties respectively, and their places of residence, in which he shall state the amount of debt and costs directed to be paid by said decree. (*Dayton's Surrogate, last ed. p. 577. See Laws of 1837, ch. 460, sec. 63. Dayton's Surrogate, ed. of 1855 p. 544.*)

IV. Sec. 64, as amended by the act of 1844, provides that on such certificate being filed with the clerk of any county, the same shall be entered and docketed in the books now required by law, for the purpose of docketing judgments, the transcripts or certificates of which shall be filed with such clerk, and shall thenceforth be a lien upon all the lands, tenements, real estate, and chattels real of every person against whom such decree shall be entered, situate in the county in which such surrogate's certificate may be filed, and execution shall issue thereon in the same manner as though the same was a judgment recorded in the court of common pleas, of said county. (*See Laws 1844, ch. 104, sec. 1, 2 and 64.*) The 3 *R. S. vol. 2, p. 320*, is correct on this point; the 4th and 5th editions are both incorrect. (*Dayton's Surrogate, ed. of 1855, p. 29. 1 Duer, 698.*)

V. "If such execution be issued and returned unsatisfied, the surrogate shall, on application, assign the bond given by such administrator to the person in whose favor such decree is made, for the purpose of being prosecuted. (*See Laws, 1837, ch. 460, sec. 65.*)

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VI. Section 63 and section 64, as amended by the act of 1844, and section 65, of the act of 1837, provide a remedy in addition to the remedy provided by the Revised Statutes in title 5, chapter 6, part 2, 5th edition, page 204, § 19, entitled, "*Of the rights and liabilities of Executors and Administrators.*" The act of 1837, is not a substitute for, nor does it repeal the provisions of the Revised Statutes. It only furnishes another proceeding which a party may adopt, instead of the statutory proceeding above cited. (*People v. Guild*, 4 Denio's R. 551.) Under the provisions of the Revised Statutes, sections 19 and 20, after a trial at law and judgment on the merits against an administrator, the plaintiff could apply to the surrogate for leave to issue execution, and if, after citation and hearing, the administrator had assets in his hands, &c. the surrogate granted an order that execution issue. Under the provisions of the act of 1837 and 1844, after the decree of the surrogate has been made and docketed, requiring the payment of a specific sum of money, execution issues of course, founded on the decree itself. Suit may be brought upon the bond set forth in the complaint, though the decree had not been docketed, execution issued and returned, or the bond assigned. (*People v. Guild*, 4 Denio, 551. *People v. Rowland*, 5 Barb. 449. *Baggott v. Boulger*, 2 Duer, 170.)

VII. In this action, the decree of the surrogate directing the payment of the judgments is conclusive upon all the defendants, both principals and sureties, and cannot be impeached in any collateral proceeding. (*The People v. Downing*, 4 Sandf. 189-91. *Baggott v. Boulger*, 2 Duer, 160-69. *The People v. Laws*, 3 Abb. 450. *Affirmed in 4 Abb.* 292. *Thomas v. Hubbell*, 15 N. Y. Rep. 405. *Lee v. Clark*, 1 Hill, 56. *Rapelye v. Prince*, 4 Hill, 119. *People v. Dunlap*, 13 John. 437.)

VIII. The proper parties were summoned, and appeared before the surrogate. The service of the citation was a jurisdictional fact, and was proved affirmatively, so that the sur-

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rogate had jurisdiction of the persons, as well as of the subject matter, and the judgment which he pronounced is conclusive upon them. (*Vanderpoel v. Van Valkenburgh*, 6 N. Y. Rep. 197. *Dykeman v. The Mayor*, 5 id. 434. *Bumstead v. Read*, 31 Barb. 661.)

IX. It appears from the *decree* of the surrogate, that there are assets in the hands of the said administrators *over and above what will be sufficient to pay all debts, claims and demands, against the estate of the said deceased*.

X. The common law rule, that an action on a bond must be brought in the name of the obligee, is abrogated by the Code. It must now be brought in the name of the real party in interest. (2 *Duer*, 170.)

For the practice of enforcing the payment of judgments in surrogates' courts, see *Dayton on Surrogates*, ed. 1861, p. 373, under the head, "*Of the Enforcement of Debts against the Estate, whether in Judgment or not.*" Also same edition, page 577, under the head, "*Of Enforcing the Surrogate's Decree.*"

*By the Court*, INGRAHAM, J. The plaintiff brought suits against Allen and Phelps, as administrators, &c. of Nahum Allen, deceased, for services rendered to the intestate, and recovered judgments against them. He then applied to the surrogate for an order that the administrators pay such judgments out of the estate of the intestate, and an order was made by the surrogate, directing the payment by the administrators within five days. The payment was not made, and the decree was docketed in the common pleas, and an execution issued from that court, against the administrators, for the amount due. This not being paid, an application was made to the surrogate, and the surrogate assigned to the plaintiff the bond given by the administrators. This action was then brought on the bond, against the sureties.

The defendant contends that these proceedings are irregular, and that the plaintiff is only entitled to payment on a general

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accounting ; and then to share equally with the other creditors, on a final distribution. He also claimed, before the referee that he was not bound by the judgments, or the decree of the surrogate ordering the money paid, and that he had a right to make a defense to the recovery by the plaintiff, by showing that the decree of the surrogate was erroneous. We think, upon both grounds, the appellant was in error.

The decree of the surrogate was conclusive upon the administrators. If they had any defense, it should have been made in that proceeding. It established the indebtedness of the estate to the plaintiff. When that was established by the decree of a competent tribunal, the administrators were bound to pay it. On their neglect to do so, the bond which they gave with sureties, as administrators, was forfeited. By that bond the sureties bound themselves for the faithful performance by the administrators of their trusts, and for obedience to all orders of the surrogate touching the administration of the estate. The sureties have no right, under such a bond, to go back of the decree of the surrogate and show that such decree was erroneous. It is conclusive, as to the indebtedness of the estate ; and as to the obligation of the administrators to make the payment.

Nor can there be any doubt as to the power of the surrogate to decree payment of a debt, against an administrator, after the lapse of six months from the granting of letters of administration. (3 *R. S.* 5th ed. p. 204.) The intent of this provision was to allow a payment of a debt due from an estate where the surrogate was satisfied that there were assets in the hands of the administrator, sufficient to pay all the debts, after six months (the time for creditors to present their claims.) It was very easy to ascertain whether the assets were sufficient for that purpose, and if so, to order payment of the debt due to any creditor.

By the act passed in 1830, (3 *R. S.* 204, § 19,) the surrogate was authorized to cause the bond to be prosecuted and the money collected on such bond applied to the satisfaction

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National Bank of the Metropolis v. Orcutt.

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of the decree. This provision, however, contemplates the prosecution of the bond by the surrogate, and not its assignment to the creditor. That is authorized by the 63d, 64th and 65th sections of the act of 1837. (*Laws of 1847, ch. 460.*) It was said on the argument, that this only applied to a general accounting; but such is not the evident intent of the statute. It applies to *any* decree made for the payment of money by an administrator. It requires a certificate of the amount directed to be paid, and the person to whom it is ordered to be paid, and provides for a judgment in favor of such person, and an assignment of the bond to the creditor named, to be prosecuted for his sole use. These were general provisions, applicable to all cases before the surrogate where money was ordered to be paid to creditors, and not merely to a general accounting of the administrator, in regard to the estate. The judgment should be affirmed.

[NEW YORK GENERAL TERM, JANUARY 7, 1867. *Leonard, Clarke and Ingraham, Justices.*]

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## THE NATIONAL BANK OF THE METROPOLIS vs. ORCUTT.

In an action by a banking association organized under the act of congress, the defendant has a right to deny, in his answer, the legal existence of the plaintiff as a corporation; but an issue of that kind should not be tried by affidavits, on motion.

Where usury is set up as a defense, the usurious contract should be so pleaded as that it may appear what rate or amount of interest was taken or secured, and on what sum, and for what time; and the answer should show a corrupt intent.

When these facts appear from the terms of the answer, nothing further is necessary, to make it sufficiently definite.

If the answer avers that the plaintiff discounted the drafts sued on at an usurious rate of interest, contrary to the statute in such case made and provided, and then specifies the amount of interest taken, this, though it may or may not be an insufficient averment of a corrupt intent, is not so palpably defective in this respect as to authorize a judgment for the plaintiff for frivolousness.

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THIS was an action upon certain drafts discounted by the plaintiff for the defendant. The defense was usury. The answer alleged that the plaintiff discounted the drafts at an usurious rate of interest, contrary to the statute in such case, made and provided, taking from the defendant the sum of \$15 for the time they had to run; though it did not, in express terms, state that the agreement was intentionally usurious. The plaintiff moved for judgment on account of the frivolousness of the answer. The court, at special term, denied the motion, and the plaintiff appealed.

CLERKE, J. I. The defendant had a right to deny the legal existence of the plaintiffs as a corporation. It is very possible that they may not have complied so exactly with the requirements of the act of congress as to make them a valid organization under that act. I see no reason why an issue of that kind should be tried by affidavits, on motion.

II. Undoubtedly the usurious contract should be so pleaded as that it may appear what rate or amount of interest was taken or secured, and on what sum, and for what time; and the answer should show a corrupt intent. When these appear from the terms of the answer, nothing further is necessary to make it sufficiently definite. In the answer before us it is expressly stated that the plaintiffs, in discounting the drafts, took the sum of \$15 for the time which they had to run; thus averring what the usurious agreement was; between whom it was made; and the *quantum* of usurious interest that was agreed upon and received. It does not, indeed, in express terms, state that the agreement was intentionally usurious and corrupt. But I think this must be necessarily inferred. At all events, the answer avers that the plaintiffs discounted the drafts at a usurious rate of interest, contrary to the statute in such case made and provided, and then specifies the amount of interest taken. This may or may not be an insufficient averment of a corrupt intent;

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but it is not so palpably defective in this respect as to authorize a judgment for frivolousness.

The order should be affirmed, with \$10 costs.

INGRAHAM, J. I have no copy of the answer, among the papers. If usury is set up as a defense, but defectively, the answer is not frivolous, though it may be bad on demurrer.

I concur in affirming the order.

LEONARD, J. also concurred.

Order affirmed.

[NEW YORK GENERAL TERM, January 7, 1867. *Leonard, Clarke and Ingraham, Justices.*]

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In the matter of JOHN O'CONNOR, a private enlisted in the United States army.

Congress has the power to pass an act prohibiting the state judges from interfering with enlistments in the army or navy, upon *habeas corpus*.

The acts of congress, of February, 1862, and of February and July, 1864, conferring upon the Secretary of War the authority to discharge enlisted minors, upon certain terms and conditions, are to be construed as having provided a mode by which persons improperly enlisted can be discharged, and as having forbidden other modes of obtaining their discharges. LEONARD, J. dissented.

The federal government has by those acts assumed such jurisdiction, in cases of this kind, as to make it necessarily exclusive. *Per CLERKE, J.*

OWEN O'CONNOR, the father, sued out a writ of habeas corpus, in December, 1866, directed to Major General Butterfield, superintendent of the general recruiting service of the United States, commanding him to produce the body of John O'Connor, appearing by the petition of the said Owen to be his son, enlisted into the service shortly before that time, under the age of twenty-one years; the said Owen being entitled to the custody and services of his said son.

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In the matter of John O'Connor.

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General Butterfield returned, to the said writ, that the said John had been regularly enlisted into the army; and he annexed the enlistment papers of the said John, whereby it appeared that he enlisted at Boston, in the state of Massachusetts, December 12, 1866; that he was then of the age of twenty-two years, born at Weymouth, Mass.; and that he was by occupation a laborer; to which statement he made oath on the 13th of December, 1866, before a lieutenant of the U. S. Artillery, who also certified to his inspection of the recruit; that he was sober, when enlisted; that to the best of his belief the recruit was of lawful age; and that in accepting him the officer had observed the regulations governing the recruiting service. General Butterfield also returned that in pursuance of the directions of the judge advocate general of the army, a copy of which in writing he also annexed, it was not his duty to produce the said recruit in court. He further declared that his denial of the jurisdiction of the court, and refusal to produce the recruit, was from a sense of official duty, and not from any disrespect or contempt of the court. At the hearing before the judge who granted the writ, the petitioner made oath that the recruit was born in Ireland, January, 1849, and that he would not be eighteen years of age until the 6th of January, 1867, and that he was not eighteen years of age at the time of his enlistment, and was supported by his father, the petitioner, for whom he worked, and to whom he owed service; that he had not sold his service, or consented to his enlistment. This evidence was not disputed, except by the introduction of the said enlistment papers, and the oath of the recruit, therein contained; but its admissibility was objected on behalf of government.

The judge thereupon denied the motion to discharge the prisoner and the prisoner appealed.

*A. Loring Cushing*, for the petitioner.

*Asa Bird Gardiner*, for the respondent.

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INGRAHAM, J. In this case, while I am of opinion that the judges of the state courts might have exercised jurisdiction, prior to the passage of the acts of 1862 and 1864, I am not clear that the right to exercise that power remains. No doubt congress might pass an act prohibiting the state judges from interfering with enlistments in the army or navy. If they possess that power, the inquiry arises, whether the provisions of those statutes do not virtually prohibit it. They provide for a mode of discharge by the secretary of war, and they annex terms and conditions in which such discharges can be granted. These provisions may be construed as having provided a mode by which persons improperly enlisted can be discharged, and as having forbidden other modes of obtaining their discharges.

I am inclined, also, to yield to the opinions of the judges of the United States court in this district, on this question, as the petitioner may apply to any of those judges, on *habeas corpus*, for relief.

At any rate it is unnecessary to send the case back to the judge who allowed the writ. All the evidence was taken between the parties, and if the general term are of the opinion that the recruit should be discharged, they can now order it. The judge below passed upon the evidence and denied the application. The general term can only reverse his decision, and make the order he should have made, if he was in error.

Motion to discharge the prisoner should be denied.

CLERKE, J. I agree with Judge INGRAHAM, in thinking that the federal government has by recent legislation assumed such jurisdiction, in cases of this kind, as to make it necessarily exclusive. This I think it has a constitutional right to do, under the power given to it "to raise and support armies." (*Const. of U. S.* § 8, *subd.* 11.) Besides, this is a "controversy" to which the United States is a party; as much so

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as to an action in which a collector of a port is a party ostensibly, but the United States actually.

LEONARD, J. (dissenting.) The weight of authority in this state is decidedly that the jurisdiction of the state courts and judges is concurrent with that of the United States upon *habeas corpus*, in cases like the present, where the prisoner is not detained by the process of any court of the United States, or any judge thereof, or the judgment of any court of the United States. (1 *Kent's Com.* 400, 401. *In re Stacy*, 10 *John.* 328, *In re Metzger*, 1 *Barb. S. C. Rep.* 248, *Edmonds, J.* *In re Dobbs*, 21 *How. Pr.* 68, *Hoffman, J.* *In re Carlton*, 7 *Cowen*, 471. *In re Webb*, 24 *How. Pr.* 247. *Brown, J.*)

In this case the oath of the recruit was held to be conclusive against himself, but not against others having the legal right to his services. To the same effect is the opinion of Judge Bacon in the case of *Berwick*, (25 *How. Pr.* 149.)

The authority principally relied on to maintain the doctrine that this court has no authority to discharge, &c. on *habeas corpus* is the case of *Abelman v. Booth*, (21 *How. U. S. Rep.* 506,) and the case of *Hopson*, (40 *Barb.* 34.) In the latter case the opinion of Judge Bacon is founded largely upon his understanding of the language of Judge Taney, in the case of *Abelman v. Booth*. Let us examine that case for a moment, and ascertain its extent as authority for the position claimed by the counsel for the government. The decision embraces two appeals affecting the same party. In the first case the prisoner was held upon process issued by a commissioner of the United States, having the powers of a judge in the issuing of process for crime, and in the other, upon conviction and sentence in a court of the United States for a crime. In such case a judge of a state court had assumed to discharge the prisoner because of the invalidity of a law of the United States under which the prisoner had been arrested in the one case, and convicted in the other. The state judge had

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assumed to undo, or disregard a legal act done by a commissioner acting as a judge, under the authority of a law of the United States conferring jurisdiction upon him to issue process, in the one case, and the trial, conviction and sentence of the prisoner by a court of the United States, in the other case. In both cases the law of the United States must have been held by the commissioner and judge of the United States to be valid. It is too plain for reasoning that a state judge would act in conflict with the judicial authority of the United States courts in attempting to discharge a prisoner held under such circumstances, and that the jurisdiction was not there concurrent.

It did not require the learned argument of a profound judge to prove the conclusion to which the Supreme Court of the United States arrived in that case, but it was expedient that the highest authority should declare the rule necessary to be observed by those who were willing to hold, as judges of the state courts, that the process and judgments of the United States courts could not be set at naught. Whatever was said by Judge Taney, in that case, was said with reference to the facts before him. When he denies the jurisdiction of the state courts, or judges, to discharge, on *habeas corpus*, prisoners held by the authority of the laws of the United States, it includes only such cases as have been passed upon, in some form, judicially, either in granting process or rendering judgment. A prisoner arrested by an officer of the United States on a criminal charge, without any process, would not be in custody by authority of law, so as to preclude a state court or judge from discharging him on *habeas corpus*. There is an entire absence of any analogy between the case of *Abelman v. Booth*, and that now before this court. It is time that its citation as an authority to uphold acts done without the authority of any law, state or national, should cease.

It is urged by the counsel for the government, that the acts of congress of February, 1862, and of February and July, 1864, (12 and 13 *Stat. at Large*,) confer upon the secretary

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of war the authority to discharge enlisted minors, and that such authority ousts the state courts and judges of all jurisdiction to discharge them on *habeas corpus*.

The authority derived from these acts, for the discharge of minors from the army, by the secretary of war, is not different from that previously existing, under which it was held by nearly every judge of this judicial district, that the authority of state courts and judges to discharge minors enlisted in the army without the consent of their parents or guardians, was concurrent with that of the secretary of war. For a complete review of these statutes, as they existed in 1862, see opinion of Judge Hoffman, in the *Matter of Dobbs*, (21 How. Pr. Rep. 68.)

The statutes of February and July, 1864, make it the duty of the secretary of war to discharge any minor enlisted under the age of eighteen years, without the consent of his parents or guardians, upon repayment to the government of all bounties and advance pay, any thing in the act thereby amended to the contrary notwithstanding. The act of February, 1862, provided that the oath of the recruit, as to his age, should be conclusive. While this section was in force, the secretary of war could not lawfully discharge a minor, who had taken such an oath, because it was made by law conclusive evidence as to his age. He may, since the amendment of July, 1864, discharge a minor enlisted under eighteen years of age, notwithstanding his oath.

It has been held, quite recently, by Judge NELSON, in the district court of the United States for the southern district of New York, in the cases of *Michael J. Conly* and *John Jump*, before him on *habeas corpus*, that this change in the law does not extend the authority to the courts, or judges, to grant a discharge to a minor enlisted under eighteen years of age. "The courts," says Judge NELSON, "are not enabled judicially to vary, enlarge or abridge the liabilities by any mandate or interposition acting upon the recruits in service, or officer in the army, in relation to their respective positions.

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The amendments of the law create no additional duties for the courts to perform, but in so far as any change is wrought upon the organization of military discipline, it transfers wholly from the cognizance of the judiciary to the department of war the *exclusive charge* of the pecuniary rights and status of minor recruits in the army. Whatever relief or amelioration government will grant that class of the common soldiery, must be obtained under the two statutes above cited. Under the constitution and laws of the land, congress has complete jurisdiction over the whole subject matter involved in the relationship created by the contract of enlistment of the soldiers." Evidence was offered by the deposition of the parents of each of these minors that they were, respectively, under eighteen years of age at the time of enlistment. This evidence was excluded as wholly immaterial. This decision is entitled to the gravest consideration. With the most profound respect for the very learned judge, I am unable to come to the same conclusion.

Congress has forbidden the enlistment of a minor under eighteen years of age. It has directed one of the heads of department to discharge any such recruit, notwithstanding the previous statute declaring that the oath of the recruit should be conclusive evidence of his age, on repayment of bounties, advance pay, &c. Such an enlisted minor is unlawfully detained in the service. Why should not the courts, or the authorized judges, so declare and adjudge, as well as the secretary of war, following the same conditions which congress has directed him to observe? It is not possible to suppose that judges will be less observant of the provisions of the law than the secretary. There is no inhibition upon the courts or judges from declaring that a recruit has been unlawfully enlisted, and is not, for that reason, unlawfully detained in the army. Nor does the law contain any provision declaring that the authority to grant discharges, in such cases, be granted exclusively by the secretary. The act of September 28, 1850, entitled "An act making appropriations for the

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support of the army for the year ending June, 1851, provided (section 5) that the secretary of war should order the discharge of any soldier enlisted under the age of twenty-one, without the consent of his parent or guardian."

The courts of this state held very generally that the concurrent duty also devolved on them to discharge minors when enlisted without the consent of parent or guardian. Particularly was it so held in the first judicial district of this state, until the suspension of the writ of *habeas corpus*, in August, 1863. There is not any substantial difference in the provisions of the law of congress now in force, in this respect, and those which then prevailed. The question is still whether the recruit is lawfully detained.

The statutes of this state are imperative upon the courts and judges to grant the writ for personal liberty, whenever applied for by a person appearing by the petition to be unlawfully detained; and, if no legal cause for such imprisonment or restraint be shown, to discharge such party. (3 R. S. 363, 367, § 21, 26, 30, 39.)

It appears to me that it is incumbent on this court to follow the authority of the statutes and decisions of the state, rather than the new and sole advice of one judge of the United States court, however much his opinion may be entitled to respect. If this court were subordinate to the district court, the rule would be different. Should any tribunal, having appellate jurisdiction over this court, arrive at a different judgment, it would then be our duty to defer to superior authority. But till such time, we should adhere consistently to the decisions of our tribunals.

There is no sufficient reason for refusing the jurisdiction. It is true it would be more convenient to do so, but the law and precedents of judicial authority, in this state, would be disregarded, and the captive could not make his wrongs heard, except through the secretary of war, who, it may be assumed, has more important matters to demand his attention. In the present case, it would be the duty of the secretary, on the

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present proof, to discharge the recruit; and it cannot be doubted that he would do so, whenever, in the press of his engagements, the case of a private soldier, on the application of his parents, or of himself, for a discharge on the grounds of his minority, should be reached—a period, perhaps, as long as that of his term of enlistment.

There can be no sufficient reason, in a time of profound peace, why exclusive jurisdiction should be required for the secretary of war, or for the detention of a military recruit, enlisted at an age when the law requires him to be discharged by the secretary, notwithstanding any oath he may have taken on the subject of his age.

Congress had the power to have conferred the authority exclusively upon the secretary of war, but, in my opinion, they have not done so; and such a construction is not required by existing circumstances.

The recruit should be discharged, upon the conditions prescribed by the statute, of repayment of bounties and advance pay, and returning the government clothing.

It is apparent that General Butterfield has not intended any disrespect of the court; but martial law no longer prevails, and the military, as before the war, are subordinate to law and order, and must obey the orders of the civil tribunals.

An order should be made reversing the order granted by the judge, directing the production of O'Connor, and that he be discharged on complying with the conditions above mentioned.

Order appealed from affirmed.

[NEW YORK GENERAL TERM, January 7, 1867. *Leonard, Clarke and Ingraham, Justices.*]

**MACKLEM and others vs. MARSH, impleaded, &c.**

An objection that the cause was irregularly put upon the calendar, by the plaintiff's counsel, and urged to trial, should be brought before the special term, on motion to set aside the verdict, and cannot be alleged as error after a trial has been had.

It is not a ground of error, affecting the judgment, upon an appeal therefrom. Where, in an action upon a promissory note, against the indorser, a witness testified that he procured the indorsement of the defendant at the request of the maker, and that the indorser had no interest in the note, or in its proceeds; *Held* that a certificate, given by the witness to the plaintiffs, before the discounting of the note, stating that the note was business paper, was admissible in evidence for the purpose of affecting the credibility of the witness, by showing that he had made a statement at variance with the testimony given at the trial, under circumstances tending to defraud the plaintiffs if the certificate was untrue.

**T**HIS action is founded upon a promissory note for \$315, dated June 14, 1861, made by the defendant Ellithorpe, to the order of the defendant Marsh, and indorsed by N. W. Seal, the other defendant. The plaintiffs, who were bankers, discounted the note for Nelson Barstow, in the usual course of their banking business. The defense was usury. Marsh was the only defendant who appeared in the action. On the trial at the circuit, the defendant moved that the case go off for the term, on the ground that it was irregularly put on the calendar, without any notice of trial being given to the defendant. The motion was denied, and an exception taken by the defendant. The jury found a verdict for the plaintiffs, for the amount of the note and interest, and the defendant Marsh appealed from the judgment entered thereon. The other material facts appear in the opinion of the court.

*A. K. Hadley*, for the appellant.

*Henry H. Morange*, for the respondents.

*By the Court*, LEONARD, J. The objection that the cause was irregularly put upon the calendar by the plaintiffs' counsel, and urged to trial, should have been brought before the

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special term, on motion to set aside the verdict, and cannot be alleged as error, after a trial has been had. It is not a ground of error, affecting the judgment upon an appeal therefrom.

The court, at the trial, admitted in evidence a certificate in writing, signed by the witness Barstow, that the note, discounted by the plaintiffs on his application, was business paper. The certificate was not admitted to prove that the paper was given for a good consideration, but for the purpose of affecting the credibility of Barstow as a witness for the defendant. Barstow testified that he procured the indorsement of the defendant Marsh at the request of Mr. Ellithorpe, the maker of the note, and that Marsh had no interest in the note or in its proceeds. The indorsement of Marsh was upon the note when the certificate was given, and before the plaintiffs discounted it. The evidence was, in effect, that, as to Marsh, the note had no vitality, and was not business paper. It was inconsistent with his certificate in this respect. The certificate was competent to show that the witness had made a statement at variance with the testimony given at the trial, under circumstances tending to defraud the plaintiffs, if his certificate was untrue; and would thus seriously affect the degree of credit to be attached to his evidence.

His certificate was given to the plaintiffs to induce them to part with their money, and imperiously required a strict regard to truth, as well as in the case of a witness while testifying. A false statement in either case, involved a moral turpitude that would well justify a jury in discrediting the witness.

The evidence was properly admitted, and the judgment should be affirmed with costs.

[NEW YORK GENERAL TERM, JANUARY 7, 1866. *Leonard, Clerks and Sullivan, Justices.*]

**KELLY and others vs. CUSHING and others.**

A bottomry bond is valid although it includes the personal liability of the master.

The master is personally liable on the bond, in such a case, for the debt secured; but not unless the vessel arrives.

The master may bind the freight, as well as the vessel, in such a bond, by express stipulation; but in the absence of such a stipulation, the bond will create no lien on the freight, directly.

Where the money secured by a bottomry bond is not paid, the lender, on proof of the insufficiency of the vessel as security, and that the pecuniary responsibility of the master is doubtful, may have an injunction to restrain the owners of the vessel from collecting the freight of the cargo brought by the vessel on her homeward voyage.

The master of a vessel has a lien on the cargo and freight, for advances made, or liabilities incurred, by him in a foreign port, for the repairs and supplies of the vessel.

And when the vessel is not of sufficient value to secure the debt, and the master is not responsible, the creditor is entitled to have this lien of the master enforced for the payment of the debt incurred for repairs. **CLERKE, J.** dissented.

**T**HE plaintiffs held a bottomry bond on the ship *Dreadnought*, for moneys advanced in San Francisco, for repairs and supplies. This bond pledged the ship and the personal responsibility of the captain. The money was payable within forty-eight hours after her arrival at her port of discharge. The money was not paid, and on proof of the insufficiency of the vessel as security, and that the pecuniary responsibility of the captain was doubtful, the plaintiffs applied for an injunction restraining the defendants from collecting the freight of the cargo brought by the vessel on her homeward voyage. The defendants moved to dissolve this injunction, which motion was granted, at special term, and the plaintiffs appealed.

*A. P. Smith*, for the plaintiffs.

*G. Dean*, for the defendants.

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INGRAHAM, J. There is no doubt of the validity of this bond, although it includes the personal liability of the master. It is made payable only after the arrival of the vessel, and it therefore assumes the risk of the safety of the vessel, before the bond is payable. (*Abbott on Shipping*, p. 156, and cases there cited.)

The master also is personally liable on this bond for the debt incurred, but not unless the vessel arrives. There are cases expressing doubts as to the personal liability, but such cases are where the master has attempted to bind the owners, and not himself. He might also have bound the freight, as well as the vessel, in the bond, and made it liable in that way. (*The Zephyr*, 3 *Mason*, 34. *The Packet*, *Id.* 255. 3 *Rob. Ad.* 240. 4 *id.* 245.) Not having done so in the bond, such bond created no lien on the freight, directly, though some cases have held the freight liable, where the bond was on the vessel and cargo, omitting the freight. In such a case Lord Stowell required the freight to be paid over to the creditor before the cargo was resorted to. (*The Dowthorpe*, 7 *Jur.* 609. See also *Leslie v. Guthrie*, 1 *Scott*, 683.)

The application for the injunction in this case was based upon the alleged lien which the captain had for advances obtained in a foreign port, and for liabilities incurred by him for the repairs and supplies of the vessel. There are several cases sustaining this position. In *White v. Baring*, (4 *Esp.* 22,) it was held that the master of the ship had a lien upon the goods and freight for debts which he had contracted on account of the ship, and that the consignee of the cargo could not pay the freight to a ship owner after notice; and if he did he would be liable to the master to the extent of those debts. This was doubted in *Smith v. Plummer*, (1 *B. & Al.* 575.) It was however adopted in *Lewis v. Hancock*, (11 *Mass. Rep.* 72,) and the greater part of the American cases adopt the same rule.

In this court, in *Ingersoll v. Van Bokkelen*, (7 *Cowen*, 670,) it was expressly held that the master had a lien on the

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cargo and freight coextensive with the advances made or liabilities incurred by him for the use of the ship, and that it is not necessary that he should have actually paid such liabilities. And in the same case in 5 *Wend.* 315, the Court of Errors affirmed the right of the captain to such lien, approving of the case in 4 *Esp.* 22.

The remaining question is whether the plaintiffs have a right to the security which the captain has to enforce the payment of the moneys due them, on proof of the doubtful credit and responsibility of the master.

This principle has been sustained in a variety of cases, upon the broad ground that where a person standing in the situation of surety is provided by the principal debtor with a collateral security for the debt, the creditor is in equity entitled to have it applied in satisfaction of the debt. (*Pratt v. Adams*, 7 *Paige*, 615. *Clark v. Ely*, 2 *Sandf. Ch.* 166. 3 *id.* 428.) In *Vail & Vail v. Foster et al.* (4 *Comst.* 312,) the Court of Appeals decided that a creditor is in equity entitled to the benefit of any collateral securities, which the principal debtor has given to the surety, or person standing in the situation of surety, for his indemnity. The same principle is applicable to this case. The master is liable not as the principal debtor, but for a debt incurred by him for the benefit of the owners. He stands therefore in the same situation as the surety, and as such the law gives him a lien for his protection on the freight of the vessel. The object of this lien is to secure to the master the expenditures made and the liabilities incurred by him in a foreign port; and when it appears that the vessel is not of sufficient value to secure the debt and the master is not responsible, I see no reason why, under these decisions, the creditor is not entitled to have this lien enforced for the payment of the debt of the master, for such repairs. If the master permits the freight to be paid to the owners, his lien ceases, and the same rule, I conclude, would apply to a creditor. Unless therefore he can stay the payment of them, he

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would lose any right he may have to have such lien enforced for his benefit. (*Dorley v. Brewer*, 1 *Daly*, 79.)

I think therefore the order dissolving the injunction was erroneous and should be reversed, and the injunction restored, with \$10 costs of the motion to dissolve, and \$10 costs of the appeal.

LEONARD, J. concurred.

CLERKE, J. (dissenting.) It may be, I suppose, assumed that *Van Bokkelin v. Ingersoll*, (5 *Wend.* 317,) has settled the long disputed question as to the lien of a master of a vessel on the freight, for advances made, or liabilities incurred in a foreign port; although it seemed to be contrary to the general current of authority in this country and in England. Strong reasons existed against recognizing such a lien; and the principal reason was, that such a lien may inequitably interfere with the lien of the seamen for their wages. The law, on the grounds of public policy, and motives of humanity, has been always very solicitous to afford the utmost security to seamen for the payment of their wages; so that, even when the vessel is hypothecated by a bottomry or respondentia bond, the claim, which it secures, has no priority over seamen's wages; although it has a priority over all other claims.

The case of *Van Bokkelin v. Ingersoll*, as I have said, undoubtedly recognizes this lien on the part of the master for advances and liabilities; but it was a case where he himself was the plaintiff, prosecuting his right to the lien. He had actual possession of a portion of the cargo, which he had retained for freight and primage, claiming and asserting his lien. It was stored by the master with the defendant; who, by the direction of the owner, delivered it to the consignee, on the payment of the freight and primage to the owner. The master sued the store keeper in an action of trover, for that portion of the cargo, and recovered, on the ground that

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he had this lien for the freight on that portion of the cargo which he had retained ; but it is distinctly affirmed, if he parted with it to the consignee, without receiving the freight, that he would have lost his lien. It is nowhere pretended that for the mere freight itself, due by the consignees, he has any lien after the latter receives the cargo. On the whole, *Van Bokkelin v. Ingersoll* goes no farther than to establish the right of a master to retain the cargo until the freight be paid to him, when he has made advances and incurred liabilities in a port other than that of the ship. It is, indeed, further added that if he collects the freight he has a lien upon it for those advances and liabilities, and that the owner of the ship cannot recover the amount of the freight until the master is indemnified. That was a controversy in fact between the master and the owner. Besides, in that, and I think in all the cases, the advances and liabilities were not secured by any bottomry or respondentia bond. The master, in that case, merely gave his promissory note for the amount of the repairs, at ordinary interest, if any. In this case the plaintiffs thought proper to receive for their security an hypothecation of the hull and appurtenances of the ship. The bond did not include more than this ; they were satisfied with it. They could have required more ; and the master could have hypothecated the freight, if the plaintiffs required it. But now they claim a priority above the claims of all other creditors and above the wages of the officers and crew ; after taking this hypothecation on the ship alone ; by which they were to receive interest at the rate of thirty per cent on the amount advanced ; the whole of which they claim in this action.

The order should be affirmed, with costs.

Order reversed.

[NEW YORK GENERAL TERM, JANUARY 7, 1867. *Leonard, Clarke and Ingraham, Justices.*]

JEREMIAH O'BRIEN, plaintiff in error, *vs.* THE PEOPLE,  
defendants in error.

Where a juror on the trial of an indictment for murder, on being challenged for principal cause, stated that he had read a statement in the newspaper, of the homicide, but that although he had an impression that a homicide was committed, he had none as to the guilt or innocence of the prisoner; *Held* that the challenge was properly overruled.

The prisoner then challenged the juror for favor, and demanded triers. These having been sworn, the juror again testified that he had read the statement in the newspaper, without any impression remaining on his mind, of the guilt or innocence of the prisoner; that, "it would require evidence, either the one way or the other, to make him convinced of the prisoner's guilt or innocence." The prisoner's counsel requested the judge to charge that the challenge was well taken, as matter of law. The judge declined so to do, and submitted the question of the impartiality of the juror to the triers. *Held* there was no error in this; and that it was properly given to the triers to decide that question.

Another juror, being challenged for principal cause, testified that he had conscientious scruples in finding a verdict where the penalty was death; but that his scruples would not prevent him from finding a verdict of guilty of murder, where the evidence required him to do it; *Held* that the juror was properly set aside as incompetent.

Where a juror states that he has conscientious scruples against finding a verdict involving the penalty of death, he is directly within the inhibition of the statute, as to jurors serving who hold such scruples.

When a juror has conscientious scruples in finding such a verdict, his competency is not established or restored by a statement that he would render a verdict of guilty, if the evidence required it.

A juror, being challenged by the prisoner's counsel for favor, testified that he thought he read or heard the statement of the homicide, published in the paper, and believed that a homicide was committed by the person charged in the paper, but it left no impression on his mind, as to the guilt or innocence of the party. *Held* that the challenge was properly overruled; the result of the evidence being that there was no impression on the juror's mind, as to the guilt or innocence of the prisoner; the person charged in the paper not being identified as the prisoner.

An indictment charged the prisoner, in one count, with the murder of *Lucy McLaughlin*, and in another with the murder of *Kate Smith*. The counsel for the prisoner moved the court that the prosecution be required to elect upon which count the prisoner should be tried. The court reserved the question. It was proved that the deceased was usually known by the name of *Kate Smith*, but there was some evidence tending to show that her name was *Lucy McLaughlin*. At the close of the evidence the prosecution entered

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a *nolle prosequi* as to the count charging the murder of Lucy McLaughlin, and the jury found the prisoner guilty, upon the other count, of the murder of Kate Smith. *Held* that there was no error in this.

Confessions are excluded only when they are made under circumstances that tend to produce doubt as to their truth, arising from the operation of hope or fear in the mind of the prisoner. When made under the effect of threats, or the sanction of an oath, without the proper caution being given that he need not answer, and that what he says may be used against him, and some other circumstances, the admissions are excluded, as matters of law.

But where the admissions are purely voluntary, they are to be submitted to the jury for what they may be deemed worth.

A non professional witness was asked for his opinion as to the mental condition of the prisoner, at the time of the occurrence. His opinion was excluded.

*Held* that the ruling was correct.

When insanity is interposed as a defense, it is not incumbent on the people to establish the sanity of the prisoner at the time of the commission of the offense, by affirmative evidence.

On a trial for murder the prisoner has no right to ask the court to charge the jury that they may infer, from the presence of intoxication, the absence of premeditation.

A charge that "if there be sufficient deliberation to form a design to take life, and to put that design into execution by destroying life, there is sufficient deliberation to constitute murder, no matter whether the design be formed at the instant of striking the fatal blow, or whether it be contemplated for months," is a very sufficient definition of murder in the first degree, when occurring with premeditation.

*Delirium tremens*, like insanity, if it deprives one of the capacity to know what he is doing, or of knowing right from wrong, saves him from any criminal responsibility for his acts.

**E**RROR to the New York general sessions, to review a conviction for murder. The legal questions raised on the trial and decided in this court, sufficiently appear from the opinion.

*Edward D. McCarthy*, for the plaintiff in error.

*A. Oakley Hall*, (dist. attorney,) for the people.

*By the Court*, LEONARD, J. The prisoner's counsel challenged Blumenthal as a juror; first, for principal cause, and secondly, for favor. The inquiries made of the juror tended

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to show that the challenge for principal cause was for the purpose of showing that he had formed or expressed an opinion as to the guilt or innocence of the prisoner, but the ground of it was not stated by counsel. The evidence of the juror established very clearly that he had read a statement in the newspaper of the homicide, but that, although he had an impression that a homicide was committed, he had none as to the guilt or innocence of the prisoner. The judge very properly overruled the first challenge, and the counsel for the prisoner excepted to the ruling, and then challenged the juror for favor, and demanded triers. These having been sworn, the juror again testified that he had read the statement in the newspaper, without any impression remaining on his mind of the guilt or innocence of the prisoner. He then said "it would require evidence either the one way or the other to make him convinced of the prisoner's guilt or innocence." The prisoner's counsel requested the judge to charge that the challenge was well taken, as matter of law. The judge declined so to do, and submitted the question of the impartiality of the juror to the triers, who found him competent. The evidence of the juror was, substantially, that he had no impression as to the guilt or innocence of the prisoner and that it would require evidence to enable him to find a verdict. Coupled with the evidence that he had no impression, the statement that it would require evidence before he could find a verdict, does not prove a bias upon the mind of the juror against the innocence of the prisoner, so as to reduce his competency to a simple question of law, to be determined by the court, and not by the triers, as a question of fact.

To "require evidence the one way or the other to make him convinced," although an awkward use of language, is free from any expression of favor, bias, or partiality. I think there was no error, and that it was properly given to the triers to decide as to the indifference and competency of the juror.

After the verdict of the triers, the prisoner's counsel withdrew the challenge, and the juror was sworn in the cause. It

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is difficult to say why the challenge was withdrawn; and if it had appeared to be well taken, I should not be disposed to deprive the prisoner of the benefit of the previous exception to the refusal of the court to charge that the challenge was well taken.

George Warner, another juror, was then called, and challenged for principal cause. He testified that he had conscientious scruples in finding a verdict where the penalty is death. He further testified, in answer to inquiries by the prisoner's counsel, that his scruples would not prevent him from finding a verdict of guilty of murder where the evidence required him to do it. The court held the juror to be incompetent, and the prisoner's counsel excepted to the ruling.

Where a juror states that he has conscientious scruples against finding a verdict involving the penalty of death, he is directly within the inhibition of the statute, as to jurors holding such scruples. It is impossible to know what evidence a juror with such scruples would consider requisite to bind him to render a verdict of guilty, when death would be the penalty to follow from the verdict. When a juror has conscientious scruples in finding such a verdict, his competency is not established or restored, by a statement that he would render a verdict of guilty if the evidence required it. His standard of required evidence is unknown, and may be as far removed from the legal and general sense of justice as are his scruples. (*Walter's case*, 32 N. Y. Rep. 161. 33 N. Y. Rep. 501, *opinion of Campbell, J.*)

Wm. H. Bluhdorn was then called as a juror, and challenged by the prisoner's counsel for favor. Having been sworn, the juror testified that he thinks he read or heard the statement of the homicide published in the paper, and believed that a homicide was committed by the person charged in the paper, but it left no impression on his mind as to the guilt or innocence of the party. The court thereupon overruled the challenge, and the counsel for the prisoner excepted. The result of the evidence was that there was no impression on his mind

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as to the guilt or innocence of the prisoner. The person charged in the paper is not identified as the prisoner. The juror, not appearing to have any knowledge of the prisoner, has not, from reading a statement of a homicide in a newspaper, any impression of his guilt or innocence. The newspaper account of a homicide, accompanied with the name of some person charged with it, does not, even if the juror believes the account, necessarily imply that he has any opinion as to the guilt or innocence of the individual who has been indicted.

These were the only objections to the competency of the jurors, brought before this court for review. There appears to be no valid objection to these rulings.

The indictment charged the prisoner, in one count, with the murder of *Lucy McLaughlin*, and in another with the murder of *Kate Smith*. The counsel for the prisoner moved the court that the prosecution be required to elect upon which count the prisoner should be tried, whether for the murder of *Lucy McLaughlin* or *Kate Smith*. The court reserved the question, and it is now urged that this was error. During the trial, evidence was given by the prosecution that the deceased was usually known by the name of *Kate Smith*, but there was some evidence tending to show that her name was *Lucy McLaughlin*. At the close of the evidence, the prosecution entered a *nolle prosequi* as to the count charging the murder of *Lucy McLaughlin*, and the jury found the prisoner guilty, upon the other count, of the murder of *Kate Smith*.

There is no difference in the two counts, except in the name of the deceased. It is the same occurrence, as to time, place and manner. There is nothing to mislead the prisoner. The use of different names for the deceased, in different counts, when every other circumstance of the homicide charged is identical, cannot lead to any mistake respecting the particular offense charged in the indictment. Of course, two such offenses could not be tried under the same indictment, nor could there have been any such misapprehension in this case. It is the practice in criminal pleading to charge

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the same offense in different ways, in order to meet the proof at the trial, as it may transpire. (*Wharton's Treatise*, § 414, 416.) There was no error here.

It is also objected that confessions of the prisoner were improperly admitted. The prisoner, immediately after the commission of the homicide said, in the presence and hearing of the officer who arrested him, that he "did it," meaning that he had committed the homicide. The next day he admitted to the same officer that a letter was written and sent by his direction to the deceased, which had been found in her room, and immediately after the homicide read, in the hearing of the prisoner, by the officer. At the time of his arrest, immediately after the occurrence, he also said that he wrote the letter. The conversation at the place of the homicide, which elicited the confession, was not addressed to him. Some one there remarked "Jerry is going to die;" the officer said he thought not; he was worth two dead men yet; that it would probably cost the county a good deal to try him. The prisoner appears to have taken offense at this, and came at the officer, but was easily restrained by the girls who were present, and he lay down on the floor. He said he "did it, and was going to plead guilty to save the county the expense of trying him." At this time he was prostrate and feeble. The next day, at the hospital, the officer told the prisoner he had come for him to go to the coroner's inquest; he also told him that he had his letter to Kate Smith, and then showed it to him. The officer also said to the prisoner, "your case is a hard one." The prisoner said, in substance, that he wrote the letter, and that he meant to plead guilty.

The writing and sending of the letter by the prisoner to the deceased a few minutes only before the homicide, was clearly proven by the other evidence, as was also the commission by him of the homicide. The statements of the prisoner added very little, if any thing, to the certainty of the proof. They appear to have been wholly voluntary. At the time of the homicide, it may be said that his remarks

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were volunteered. The fact of the homicide was too plain for denial. No one can entertain the slightest doubt that his statements were strictly the truth, for they were fully corroborated by other evidence. I am unable to perceive that the prisoner was actuated in making his statements in the slightest degree by hope or fear as to the result of the homicide affecting himself. Confessions are excluded only when they are made under circumstances that may tend to produce doubt as to their truth, arising from the operation of hope or fear in the mind of the prisoner. When made under the effect of threats, or the sanction of an oath, without the proper caution being given that he need not answer, and that what he says may be used against him, and some other circumstances, the admissions are excluded, as matters of law. But where the admissions are purely voluntary, they are to be submitted to the jury for what they may be deemed worth. Such appear to be the character of these admissions, and I think they were properly left to the jury.

Some questions were raised in respect to the sanity of the accused. A non-professional witness was asked for his opinion as to the mental condition of the prisoner at the time of the occurrence. His opinion was excluded. This ruling was correct, as it appears from authority. (*De Witt v. Barley*, 9 N. Y. Rep. 371. *The People v. Lake*, 12 N. Y. Rep. 358.)

The prisoner's counsel asked the court to instruct the jury that "Where insanity is interposed as a defense, the affirmative of the issue is with the people, and they must establish the sanity of the prisoner at the time of the commission of the alleged crime, by a preponderance of evidence." The contrary rule is declared by the Court of Appeals in *Walter v. The People*, (32 N. Y. Rep. 147.)

The prisoner's counsel also asked the court to charge, "that the jury might infer from the presence of intoxication the absence of premeditation." This request was also against the decision of the Court of Appeals in *Kenny v. The People*, (31 N. Y. Rep. 330.) After the jury had retired, they again

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came into court, and one of the jurors asked the court to instruct them how much premeditation is necessary to constitute the difference between the first and second degrees of murder. The judge stated to them that the Court of Appeals say: "If there be sufficient deliberation to form a design to take life, and to put that design into execution by destroying life, there is sufficient deliberation to constitute murder, no matter whether the design be formed at the instant of striking the fatal blow or whether it be contemplated for months." It was said at the argument, that this definition was read from the report of a case decided before the act now in force, respecting murder in the second degree, was enacted. It is, however, a very sufficient definition of murder in the first degree, when occurring with premeditation. The statute has given no definition of murder in the second degree, except a negative one; that it is not murder in the first degree, nor any of the degrees of manslaughter. The judge might have instructed the jury, less favorably for the prisoner, that murder in the second degree could not occur, where the homicide was committed with premeditation.

One of the jurors also asked the court below to be instructed upon this further question: "Is a person under *delirium tremens*, of sound mind in the meaning of the statute?"

The judge, after reading several passages relating to drunkenness, also read to the jury the following passage from a case in the Court of Appeals, as his instruction in answer to the said request: "It is a duty which every one owes to his fellow men and to society, to say nothing of more solemn obligations, to presume, so far as it lies in his power, the inestimable gift of reason. *If it is perverted or destroyed by fixed disease, though brought on by his own vices, the law holds him not accountable.* But if, by a voluntary act, he temporarily casts off the restraints of reason and conscience, no wrong is done him if he is considered answerable for any injury which, in that state, he may do to others or to society."

One of the witnesses testified, that delirium caused by in-

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toxication was a symptom resembling moral mania, in some instances ; and that he regarded it as a species of temporary insanity. There was no evidence that the prisoner was suffering from delirium tremens, at the time of the homicide. About the first week in June he was with the Fenians on the borders of Canada, and having called on a physician, stated that he had no appetite ; could not sleep ; restless ; saw ocular spectres ; fancied he saw things ; and had been drinking for some days. The doctor formed the opinion that he was suffering from an incipient attack of delirium tremens. Another said he looked wild and excited, just before the killing : another, who drank liquor with him shortly before the occurrence, thought him under the influence of liquor. There was no evidence that the prisoner had delirium tremens at the time of the occurrence. There was some evidence that such delirium, where it existed, might amount to moral mania, and that it was a predisposing cause to insanity, but none that the prisoner was so affected. The jury had been previously correctly instructed on the subject of insanity. There was nothing in the evidence calling for any instruction upon the particular subject to which the inquiry related, and I am at a loss to know why the inquiry was made. There was but a small part of the citation read by the judge that had any reference to the inquiry. All that related to drunkenness, was wholly foreign to it. If any instruction had been requisite, it should have been to the effect that delirium tremens, like insanity, if it deprived the prisoner of the capacity to know what he was doing, or of knowing right from wrong, saved him from any criminal responsibility for his acts.

No other objections were urged as grounds for reversing the judgment of the general sessions, and in my opinion none of these are well taken.

The homicide was a brutal murder, without any qualifying circumstances, and no injustice has been done by the conviction. The judgment should be affirmed.

[NEW YORK GENERAL TERM, January 7, 1867. *Leonard, Ingraham and Clarke, Justices.*]

THOMAS S. BUCKLEY and others *vs.* WILLIAM C. BENTLEY,  
impleaded, &c.

Parol evidence is not admissible to vary, enlarge or contradict a written stipulation, made by an indorser of a promissory note, waiving "notice of protest." The rule excluding parol evidence to enlarge or contradict a writing, is not limited to contracts made upon a consideration passing between the parties, but is equally applicable to all cases where the writing was designed to be the repository and evidence of the final conclusions of the parties. MASON, J. dissented.

**A**CTION upon a promissory note, against the defendant Bentley, as indorser, of which the following is a copy, viz :

"\$172.78. One year after date, I promise to pay to the order of Buckley, Sheldon & Co. one hundred and seventy-two dollars and seventy-eight cents, for value received. Dated Butternuts, Sept. 9, 1859.

(Signed) WILLIAM D. BABCOCK."

(Indorsed on the back,) "WILLIAM C. BENTLEY."

In July, 1860, the indorser wrote over his signature as follows: "Notice of protest waived by me." The plaintiffs made no demand of payment of the note of the maker, at maturity, and took no steps to charge the indorser.

The cause was first tried at the Otsego circuit in December, 1863, before Justice CAMPBELL, without a jury, who ordered judgment for the plaintiff. Bentley appealed to the general term, which reversed the judgment, and ordered a new trial. (*See 42 Barb. 646.*)

On the second trial, in December, 1865, before Justice MASON and a jury, substantially the same facts were proven as on the first trial. The counsel for the plaintiffs also offered to prove the conversation between the plaintiff Buckley and the defendant Bentley, at the time Bentley wrote the words "Notice of protest waived by me" over his signature, on the back of the note, and that it was then agreed that the plaintiffs need not protest the note, or make any demand of payment of the maker, when it became due. The defendants' counsel objected on the grounds: 1st. The agreement be-

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tween the parties was reduced to writing, and parol evidence is incompetent and improper to vary, or enlarge, or contradict the writing. 2. Parol evidence of what occurred at the time of making the writing is incompetent, improper, and immaterial. 3d. There is no ambiguity in the language used, and parol evidence is inadmissible and incompetent to vary or explain the writing. 4th. There is no allegation in the complaint of any other than the written waiver, indorsed on the note. The court overruled the objection, and admitted the evidence, to which the defendant's counsel excepted. The plaintiff Buckley then testified as follows: "I have a distinct recollection of the language used by Mr. Bentley. He said: 'I am on Babcock's paper for \$700 or \$800; he has failed and I am going to lose; there is no use of sending it forward for protest.' He also said: 'I cannot pay this note when due, and therefore will say to you, that it is not necessary to protest it when due, or to send it out there to demand payment of the maker.' I told him that as the note would not be paid at maturity, it better not be protested, and he assented." *Cross-examined.* "This conversation was at the same time, and before he wrote the waiver on the note. We had no further talk after he wrote the waiver." This testimony was contradicted by the defendant Bentley; and other evidence was given on the trial, not material to the question upon which the case turned.

The defendants' counsel asked the court to direct a verdict in favor of the defendant Bentley, which the court declined to do, and he excepted.

The court charged the jury that as it appeared from the evidence that the defendant Bentley had no knowledge of the failure or omission to demand payment of the note at maturity, of the maker, when the indorsement of \$25 was made on the note, nor when he wrote the letter of October 7th, 1861, alluding thereto, such indorsement or application of the \$25, was not a waiver by Bentley of such failure or omission of demand or protest, on the part of the plaintiffs;

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and upon that branch of the case the plaintiffs could not recover.

The court further charged the jury that if the defendant Bentley said to Mr. Buckley in their conversation at the time he made the written waiver on the note, that the plaintiffs need not forward the note at maturity for protest, or that he would waive the demand of payment at maturity, then the plaintiffs could recover against him upon his indorsement, in this action. To which the defendant's counsel excepted.

The jury rendered a verdict in favor of the plaintiffs for \$219.62, the balance due upon the note. The court stayed proceedings upon the verdict, and ordered the defendant's exceptions to be heard at the general term, in the first instance.

*George Becker*, for the plaintiffs.

*Sturges & Countryman*, for the defendant.

*By the Court*, PARKER, P. J. The principal question in this case is whether the indorsement upon the note by the defendant of the words, "Notice of protest waived by me," concluded the plaintiffs from showing that the verbal arrangement between the parties which resulted in the entry of those words on the note by the defendant, was that demand of payment as well as notice was waived—in other words, whether it was competent for the plaintiffs to prove that in the conversation prior to the entry of that waiver upon the note, it was expressly stated by the defendant and understood by both parties, that the note was not to be sent forward for demand and protest, and that the plaintiffs acted upon such understanding, and therefore omitted to demand payment of the maker. Although the arrangement then made was not a contract, because there was no consideration, and must operate if at all by way of *estoppel in pais*, still the question is what was the arrangement; and as the parties undertook to put it in writing, whether what was then written must

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not be deemed the arrangement concluded upon, equally as though it had been a contract, and whether it was any more open to the plaintiffs to fall back upon the prior negotiations and conversations to ascertain what was agreed upon than if it were a full and complete contract.

The writing in this case was designed to be the repository and evidence of the final conclusion of the parties, and hence it is within the reason of the rule, and I think within the rule itself, that all oral testimony of a previous *colloquium* between the parties must be rejected. (1 *Greenleaf on Ev.* § 275.) The reason of the rule as stated by Lord Coke (5 *Rep.* 26) is that "it would be inconvenient, that matters in writing made on consideration and which finally import the truth of the agreement of the parties, should be controlled by an averment of the parties, to be proved by the uncertain testimony of slippery memory." "The parties, by making a written memorial of their transaction, have implicitly agreed that in the event of any misunderstanding, that writing shall be referred to as the proof of their act and intention." (1 *Murph. Rep.* 426.) The propriety of the rule, and of its application to this case, is manifested by the contradictory statements of the parties, as to what was the conversation and arrangement which led to the entry of the indorsement upon the note; the plaintiff, Buckley, testifying that the defendant told him there was no use of sending the note forward for protest, while the defendant testified that Buckley asked him merely to waive notice of protest, and that he wrote the waiver on the note precisely as requested; and that he did not say there was no use of sending the note forward for protest, nor that payment need not be demanded.

There could be no doubt, I think, if this were a contract, that evidence of the *colloquium* which led to the entry would be inadmissible, especially for the purpose of modifying or changing the effect of what was expressed in the writing. Assume that the parties conversed about a waiver of demand and notice, and finally reduced their agreement to writing,

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which reads, "Notice of protest waived by me;" if this were a contract upon sufficient consideration, it would scarcely be pretended that the plaintiffs in seeking to avail themselves of the contract in a court of law, would be permitted to go back of the writing and prove that the agreement comprehended a waiver of demand of payment, as well as notice of non-payment. It would not be the case of a contract resting partly in writing and partly in parol, when oral proof would be admissible to supply the deficiency in the writing; for manifestly the writing was intended to express the entire agreement. The parties have put the agreement which they made on the subject of what should be waived into writing, and are to be deemed to have given thereby full expression to their meaning, and hence parol evidence of their language contradicting, varying or adding to that which is contained in the written instrument, must be excluded. (1 *Greenl. on Ev.* §282. *Renard v. Sampson*, 12 *N. Y. Rep.* 561.) That there was no consideration for the agreement, cannot change the rule of evidence, in regard to what shall be competent proof of what the agreement was. It is a rule of evidence applicable to the mode of proving a fact, and whether that fact is a contract or a waiver, it seems to me can make no difference with reference to its applicability. This principle was held in *Halliday v. Hart*, (30 *N. Y. Rep.* 474.)

If the principle adverted to applies to this case, the written entry on the note must be taken as the evidence of what the parties finally agreed upon as to the waiver, and the plaintiffs had no right to rely on what had been said in reference to a waiver of demand. It follows that the admission of parol evidence of the prior and contemporaneous conversations on the subject between the parties was erroneous, and a new trial must be granted, with costs to abide the event.

MASON, J. dissented.

New trial granted.

[BROOME GENERAL TERM, JANUARY 22, 1867. *Parker, Mason, Balcolm and Boardman*, Justices.]

In the matter of proceedings for the improvement of Brooklyn Heights.

Even assuming that it would be competent and lawful for the city of Brooklyn to take lands for a public street or highway, on the payment of a nominal sum therefor, upon the ground that the original proprietors had dedicated the same to that purpose, it does not follow that they can be appropriated, and that the title thereto can become vested in the city, as "public places," under the act of April 17, 1866, "for the improvement of the Brooklyn Heights."

When such proprietors declared their willingness to dedicate their property to the purposes of a street, whenever the public authorities would accept the dedication, the property, nevertheless, continued subject to their control and absolute enjoyment until such acceptance was made.

In determining the value of land thus taken, it is proper for the commissioners of estimate to take the fact of such dedication, and the probability of its future acceptance, into consideration; and if the property is thereby depreciated, the amount of the depreciation may be properly deducted from what would otherwise have been the fair, full value thereof. But it is erroneous to allow a nominal compensation, only, to the owners.

THIS is a proceeding, in connection with four others, under an act of the legislature, entitled "An act for the improvement of the Brooklyn Heights," passed April 17, 1866, to take the lands which, in the language of the act, "would be in Middagh street, upon the opening thereof to Furman street, and lying between Columbia and said Furman street," for a public park. The property is fifty feet wide by about one hundred and sixty feet deep, is situated at the most precipitous part of the Heights, and is now, and always has been, practically impassable. Upon the western portion of the land are two brick buildings, each two stories high, one about twenty by thirty feet, the other about twenty-two by fifty feet. Valuable fences, walls and trees, have been placed on the property, and it has, to some extent, been filled in with earth. The commissioners awarded the owners of the fee of these lands and improvements six cents damages. This award of nominal damages was made upon the theory that the present interest of the owners of the fee is "an estate in fee, subject to dedication to use as a public street and servitude as

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a street." It is not disputed that the value of the property to be thus taken was \$16,000. On presenting the report of the commissioners of estimate, dated September 15, 1866, together with their additional report made October 23, 1866, the court, at special term, formally affirmed the said report, without expressing any opinion upon the questions raised. From that decision the owners appealed.

*G. T. Jencks, J. M. Van Cott and Ludovic Bennett*, for the appellants. I. The true rule of compensation, in this case, is to award the owners in fee of the land to be taken, the true and full value of their interest in the lands with the improvements. To ascertain the value of their interest, it is first necessary to determine what is that interest. It is not denied that if these lands were originally dedicated to the public use as a street; and the public have not lost or surrendered their rights to accept the grant; and this were a proceeding by the public in its corporate character as the city of Brooklyn, to open the said street in acceptance of the original dedication, the grantees of the original dedicators, the present owners of the fee, would be entitled to only nominal damages. But—1. It is doubtful if there were originally any dedication. 2. If any, it is certain that the public never accepted it, and that their right to accept it has been lost or abandoned; and 3. This is not a proceeding to accept the dedication and open the said street, but a proceeding to take the whole property, both the fee and the alleged easement, for a purpose never contemplated by the original proprietor and supposed dedicator of the land, and in complete violation of it, to wit, to take the lands for public parks and vest the title thereto absolutely in the city.

II. A way which terminates upon a private close, and is, therefore, not a *thoroughfare*, cannot be made a highway by dedication. (*Holdane v. The Trustees, &c. of Cold Spring*, 21 *N. Y. Rep.* 474.) The ancient form of indictment always

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showed both the termini of a public highway ; and the reason was that if the way did not lead from town to town it was not a highway. Lord Mansfield, Ch. J. "I am of the opinion that this did not amount to a dedication ; that a *cul de sac* could not be dedicated as a highway." (*Woodyear v. Hadden*, 5 Taunt. 125. *Woolr. on Ways*, 11.) No case has been found, and it is believed there is none, in either the English or American books, which decides that lands *over* and beyond which the public cannot lawfully pass can be dedicated to the public use as a street or highway. To be a highway it must have a place of lawful exit, as well as of entrance. In the case at bar, the lands west of Columbia street, included within the lines of the proposed Middagh street, were a *cul de sac*. They ended at a precipice, and at the boundary line of other lands owned by and in possession of parties other than the dedicators. This fact appears by the maps in this case, and also in the *Furman street case*, (17 Wend. 649.) It also appears in an examination of the Hicks map of 1806 itself. The lines of Middagh street are carried to the river, but it appears by the scale on which the map is projected, that the western line of the Hicks property was really about 160 feet west of Columbia street, and being about the present easterly line of Furman street. Other persons owned the land from this line to the river shore. Furman street was not opened until 1836. Thus for thirty years after this supposed dedication, these lands were closed at their western boundary, and could not be passed over, or entered from the west by the public, without trespassing upon the lands of the owners beyond. The map of the village of Brooklyn, in 1816, adopting the Hicks map for the street lines, therefore, could not extend Middagh street to the water, on the supposition of a dedication by the Hickses. For thirty years, therefore, there could have been no public user of this land ; and, subsequently, Middagh street was opened by the authorities, but not west of Columbia street. Which act is by implication a denial

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or renunciation of any right to accept the alleged dedication of this land. (17 *Wend.* 649, *supra*. *Proceedings for Opening Middagh Street, and Furman Street, filed in the Street Commissioner's office.*)

III. The original dedication merely granted to purchasers of lands bounded by the proposed streets, private rights of way. The public easement is worked out through these private rights, and must be established by the corporate authorities during their existence. This enlargement of the private into a public easement secures the private rights of the land-owners, which might otherwise be lost, and places the duty and burthen of maintaining the way on the public. From it springs the rule for the award of nominal damages to the dedicator on the acceptance of his grant.

But (1.) if the public do not accept the dedication before the extinguishment of the private easement, it cannot do so afterward. With the loss of the private easement, the public right to accept the dedication is extinguished. (2.) The private easement may be lost by an adverse possession, as where one enclosed a part of the land dedicated and held exclusive possession thereof for twenty-five years, he gained a valid prescriptive title to the same, and the private easement was lost; or by a release of the private rights by all the owners thereof. (*Alvey v. Town of Henderson*, 16 *B. Monroe*, 131, 172. *Rowan v. Portland*, 8 *B. Monroe*, 232, 247. *Baldwin v. Buffalo*, 29 *Barb.* 396.) (3.) The public have never accepted this dedication; and (4.) The grantees of the private rights of way have long since lost their easement by an adverse exclusive possession of over twenty years.

IV. The dedication does not subject the lands to the public servitude as a highway, unless the dedication is accepted by the public authorities. To constitute a good dedication there should be an intention and an act of dedication on the part of the owner, and an acceptance by the public; as soon as these concur, the dedication is complete. (*Washburn on Easements*, p. 139, ch. 1, § 5. *Underwood v. Stuyvesant*,

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19 *John*. 180. *City of Oswego v. Oswego Canal Co.* 2 *Seld.* 257. *Child v. Chappell*, 5 *id.* 246. *Clements v. West Troy*, 16 *Barb.* 251. *Green v. Chelsea*, 24 *Pick.* 71. *Hemphill v. Boston*, 8 *Cush.* 196, *Shaw, C. J.* 19 *Pick.* 405. 8 *Metc.* 243. 4 *Cush.* 340. 7 *Gray*, 343. 1 *Allen*, 153.) (1.) There has been no acceptance of the supposed dedication in this case by the public, either expressly or impliedly. The designation of the site of a street (on maps or in deeds) is not, in any sense, opening it. (*Matter of Furman street*, 17 *Wend.* 649.) The map of the village of Brooklyn, in 1818, was made for the express purpose of exhibiting the streets, &c. to be laid out, "in order that no resident may plead ignorance of the permanent plan to be adopted for opening the streets, &c. of said village." (*Laws of 1816, ch. 95, incorporating Village of Brooklyn.*) The above act authorized the village trustees to enter upon all lands they shall deem necessary to be surveyed and *used for laying out, opening, and forming any street or highway*. No entry was ever made on these lands under the above act, or any other. (2.) The user set up by the commissioners was not a public user. It is notorious that the lands at the extremity of Middagh are now, and always have been, practically impassable, by reason of their precipitous and dangerous descent. The public have never used them as a public way. The only usage has been that of stragglers climbing up the heights along the whole front, without reference to any street lines. In 1806 there were no public authorities, no corporation of Brooklyn. A few farmers occupied the whole of the site of the present city. Furman street was opened in 1836. Until then there could have been no public thoroughfare over these lands. They have been held in exclusive and adverse possession for twenty-five years. The act of April 8, 1834, ch. 92, section 50 (charter of city of Brooklyn) does not apply to streets in the first seven wards, unless they had been used, graded and paved as streets; or, if it did, the user must have been for ten years *after the passage of that act*. Of such user the

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case shows there was none. (3.) The city of Brooklyn has not only never accepted the dedication, but has repudiated and refused it by the most unequivocal acts. It has for many years taxed these lands for their full value, and received payment of the taxes from the present owners. It has sold the land for non-payment of these taxes, and delivered under the seal of the city, to the purchaser, long leases of the same. April 13, 1843, these lands were sold by the city for an unpaid assessment made thereon for the paving of Furman street from Fulton to Pierrepont streets. The conveyance was delivered July 12, 1845. April 15, 1858, part of these lands were sold for unpaid assessments for fencing Columbia street, between Colonnade Garden and Poplar streets. The fence was put up across the whole of the Columbia street front of these lands, and was built under the authority of an ordinance of the common council. There have been other sales thereof for taxes. The city has formally opened Mid-dagh street west of Columbia. It also has graded, levelled, paved, and generally maintained that part of the street as a public highway, and for over twenty years past it has stood by and seen this property in the exclusive possession of these owners, fenced, improved, filled in and built upon, without objection or interference. Sixty years have elapsed since this supposed dedication, and unless it be a subsisting grant forever, a stronger case of extinguishment of the public right to take the easement could not be made.

V. As to the payment for the improvements on these lands, the owners of the fee had the right to build on and improve the same, subject to the right of the public to *accept the dedication and open the street*, and to then award nominal damages.

VI. If the foregoing premises are established, it follows that the appellants are owners in fee of the lands in question, discharged of any "dedication to use as a public street, or servitude as a street," and would be entitled to be paid the full value of the lands and improvements, were this a pro-

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ceeding to open said lands as a street; *a fortiori* in this proceeding they are entitled to such payment.

VII. The city of Brooklyn is not a party to this proceeding. The act creates a board of commissioners whose existence is perpetual. In them and their successors (self appointed) is placed the whole of the powers and duties prescribed by the act. The title only of the lands is to vest in the city, and that not until after the confirmation of the commissioners' report by this court. The owners of this private easement, if any, are not interested in this proceeding. The question of dedication, therefore, could not properly be raised by these commissioners. But the act of 1866, itself, determines the right of these owners to full payment of the value of their lands.

VIII. The act recites that the lands which *would be* in Middagh street upon the opening thereof, and which lie between Columbia and Furman streets, "*are hereby declared to be public places*, and the same shall, when duly opened under this act, be under the control and management of the commissioners," and "the title to said lands shall vest in the said city as public places." The act expressly repudiates and overthrows the original dedication, if any there were. It denies that there ever was such a dedication. It subverts both public and private easements, if any such exist, and in violation of the original dedication takes the lands in fee for a purpose totally different from the intention of the dedicator. The public and private right of way over the land, as a street, are taken away; the old use is destroyed and a new one set up. The lands are to be enclosed and turned into a public park. The legislature has no power to thus appropriate these lands without providing for the payment of the owners in fee of the just compensation for the lands and improvements taken. (*Williams v. New York Central R. R.* 16 *N. Y. Rep.* 97. *Presb. Soc. of Waterloo v. The Auburn and Rochester R. R.* 3 *Hill*, 567. *Hayward v. Mayor of New York*, 3 *Seld.* 314. 7 *Barn. & Cress.* 257.)

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IX. The report should be sent back to the commissioners for correction, with directions to award the appellants compensation in the full value of the lands and improvements of which they are to be deprived by this proceeding.

*Sidney V. Lowell*, (assistant corporation counsel,) for the respondent. I. The premises taken for this improvement are parts of certain public streets in the city of Brooklyn; being that portion of Pineapple, Orange, Cranberry and Mid-dagh streets, which are on the extreme brow and slope of the Heights of Brooklyn. Being situate on the site of a steep bank, they are not capable of any valuable, practicable use as thoroughfares, but are valuable to all the surrounding neighborhoods as "lookouts" upon the East river and harbor of New York for air and view. The act in question is to put them under the management of a board of commissioners appointed by the act for the purpose of "inclosing, sustaining, grading, planting, and beautifying" them. For the purpose of holding an inquisition as to any damage that there might possibly be to any person by reason of the improvement, and fix the legal right of the public, the commissioners whose report is presented were appointed.

II. The commissioners have awarded certain sums to the owners of certain improved premises immediately adjoining the improvement, for incidental damages, and have found and decided as matter of fact that otherwise than as reported, no damage is sustained by any person, by reason of the improvement.

III. One John J. Merritt, and others, who had obstructed the streets with buildings, &c. have appealed from the report, and make three grounds of objection:

1. Because the land in the streets is reported as being dedicated as streets.

2. That if they were streets, nevertheless they should receive compensation in the same manner as though they were not, as owning it absolutely and unrestrictedly.

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3. That the commissioners have not awarded compensation for incidental damages. This objection was raised before the court had finally completed their report, and on the "review" thereof they awarded a sum therefor.

The only questions then are :

1st. Was the land said to be dedicated as a street actually subject to such dedication? This question, though a good deal of evidence to show its dedication is submitted by the affidavits to sustain the report, is settled by reference to the very deeds by the original proprietors of the land forming the same through which the present owners derive title, which expressly declare that the same are conveyed, each "*as an open street, and as having been used as a street in the said village, and described as such by the said parties of the first part, &c. on maps and in deeds, and not otherwise howsoever.*"

2. Independent of the paper dedication, these streets have become public streets by user. Under the charter of 1834, streets theretofore laid out by the owner of lands through which they ran, and thrown open to the public and used as streets, became public streets for all purposes after they had been so traveled for ten years. It is undisputed that these streets were used as open public streets—open to all the world, from before the year 1816 to subsequent to 1845—nearly thirty years. The provisions of the Revised Statutes, (*section 99, title 1, chap. 16, part 1st, p. 521, Edmonds' ed.*), have no reference to the streets of incorporated villages or cities which are opened under special acts, which prescribe different modes of opening and regulating as to each village and city. They apply only to the general system of roads and highways existing throughout the state, leaving the local territory of municipalities to be governed or regulated by their peculiar laws or charters. In the city of Brooklyn, as incorporated in 1834, the streets in the first seven wards, the older part of the city, which had formerly constituted the old village of Brooklyn, were placed

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under the power and authority of the common council (*Laws of 1834, § 40, p. 105.*) Over them the city ordinances extended, "whether the same have been or shall be laid out in pursuance of this or any other statute, *or by the mere acts of the owner* or owners of the land through which they may run." (*Section 49, p. 109.*) The outer wards of the city, only, were regulated by general statutes, and in that case by a law relating to the counties of Long Island only. (*Id. § 38.*) Therefore none of the systems of streets in the city were opened or regulated under the general state law as to roads or highways, and there were no "commissioners of highways" having authority over the streets of the first seven wards.

They were not subject to discontinuance by nonuser, but in the words of the city charter, "The same shall *forever* thereafter remain and be considered, to all intents and purposes, as a public street of the said city." (*Id. § 50.*) The streets in question are streets in the first ward of the city of Brooklyn; streets shown on the original plan of the old village; streets which had been laid out even before the plan was made, and to endure for all time as city streets, not as country roads which might be discontinued by tacit understanding with the "highway commissioners" and at the pleasure of half a dozen farmers whose interests only they conserved. They are the highways of the people. No statute of limitations shields those who unlawfully appropriate them. This has been expressly decided by the Court of Appeals in *Walker v. Caywood*, in which case it is held that the only statute of limitations which has any analogy to the case is the provision that roads laid out under the general state law may be closed if discontinued for six years. Which statute does not apply to the streets of Brooklyn. (31 *N. Y. Rep.* 51.) No erection and incumbrance on the streets subsequently placed there was legalized by lapse of time; obstructions in a public street are nuisances, and the claim-

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ants can be indicted for their acts in obstructing the same. (*People v. Cunningham*, 1 *Denio*, 524.)

3d. The next question then is, the streets being such, should awards be made to the representatives of the grantees under the preceding deeds, the owners of the naked fee, to the same extent as if the streets were building lots owned by them?

It has been decided over and again that the commissioners in these proceedings are to estimate the value of the land according to the interest the party has in it, whether qualified or not. By the conveyances under which the parties in interest hold, the land is conveyed to them as an "open street" and "not otherwise," and for this qualified interest in the land being of nominal value, the commissioners have made corresponding awards of nominal damages. In the *Matter of Albany street*, Chief Justice Savage says in relation to taking property held as a churchyard by Trinity church: "Can it be right to consider it now as building lots and assess its value as such to the church as advantage? It seems to me the true rule of estimating the damage is to appraise the property at its present value to the owner, considering the extent of the interest which the owner has and the qualified rights which may be exercised over it." (11 *Wend.* 150.) In the matter of *William and Anthony streets*, it was held, (Bronson, J.,) that the lessened value of the property taken, owing to disadvantageous clauses in leases thereof, should be considered. (19 *Wend.* 678. See also *Owners of Ground v. Mayor, &c. of Albany*, 15 *Wend.* 374: *Matter of application of Mayor, &c. of N. Y. for improve't of Nassau St.*, 11 *John.* 77.) The rights of the appellants are altogether decided by the answer to the question, were the premises dedicated as public streets, or not? The commissioners have found, as matter of fact, that there is no increased damage to ensue by taking the premises for the uses of the act for public places or squares, than existed before in the use of the same as thoroughfares, other than what they have allowed as inci-

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dental damage to adjoining property. The premises are taken to be used for no other purposes than those to which they were subject before as part of the urban uses of city streets, viz: to be open to the air and view, graded and beautified. In fact the public use is lessened by the same not being subjected to unrestricted travel. But the owner of the naked fee therein is deprived of no use of the land other than what is also taken from the general public. While all other uses of the street remain, he and they may not travel over the same in the more unrestricted manner in which streets may be traveled than parks. While he may be more interested in this use than others, he is also more benefited by the improvement of his adjoining land.

Finally, the premises are not taken "in fee simple absolute" (as in the case of *Hayward v. Mayor, &c. of N. Y. 3 Selden*, 314,) quoted before the commissioners, but prudently not referred to on this appeal; but only for "open" "public places," and with which qualified title as public places only is the city to be invested; they have not been stricken from the official map of the city as is done in all cases where the streets are meant to be forever obliterated; the act contains no such provision. They still stand upon the old Hicks' map. They still stand upon the official map of Brooklyn. When they cease to be parks, if ever, they become streets again. The city cannot convert them into building lots, or sell the land.

The appellants' argument, that by a kind of legal somersault, caused by this proceeding, the land in the street "reverts" to them as building lots, has no foundation. They never had or acquired any such title to the land, and the land never was building lots, from the time of the old farm.

The cases relied on by the appellants (*Williams v. Central R. R. Co. &c.*) are suits in trespass and actions for damages, where railroad companies have undertaken to lay tracks and commit other nuisances (held to be such) in front of and along the plaintiff's lands. They are all cases where addi-

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tional uses were sought to be imposed upon lands, for the benefit of private corporations, than those to which they were subject as city streets, or country roads, and which were injurious to other lands of the parties plaintiff, without any payment of damages, or any legal inquisition being had according to law, to ascertain whether any person would be damaged thereby. The report follows the precedents of all the other parks in the city, while for the propositions of the appellants there is no precedent whatever.

If the commissioners have erred, the court should point out the error, and send the report back for correction.

*By the Court, LOTT, J.* Assuming that it would have been competent and lawful for the city of Brooklyn to have taken the lands in question for a public street or highway, on the payment of a nominal sum therefor, upon the ground that the original proprietors had dedicated the same to that purpose, it does not follow that they can be appropriated and opened, and that the title thereto can become vested in the city "as public places," under the act above referred to, without making full compensation for the same. Those proprietors had the right to make such a disposition of their lands as their interests or wishes dictated, and they will be bound to that extent, and no further; and when they declared that they were willing to dedicate the same for the purpose of a street, whenever the public authorities would accept the dedication, the property nevertheless continued subject to their control and absolute enjoyment until such acceptance was made. It is useless to speculate whether the effect or result of appropriating the lands for the purpose of a "public place," in respect to its future enjoyment by the owner, would be the same as if opened for a street, or whether such a use would or would not be productive of greater damages to him than the other; it is sufficient to say that he has not consented to such an appropriation thereof.

The question, then, to be considered is what measure of

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compensation is just and proper to be allowed to the owners of the lands taken for the improvement authorized by the said act. It is established by the proofs introduced before the commissioners that the principal part, if not all, of the lands had been dedicated by parties under whom the appellants claim title, for the purposes of a street. Such dedication has, however, never been accepted by the public authorities; on the contrary, they have treated the property as private and liable to taxation. The use of it, as stated in some of the affidavits, does not prove an acceptance. It is, therefore, not subject to present existing servitude as a street or highway. It may be that if the act under which the proceeding was taken had not been passed, the city of Brooklyn would have accepted the dedication thereof at some future time, (although from the construction of the ground and the apparent impracticability of using it as a street, it is improbable,) and it would be proper for the commissioners, in determining the value of the property, to take the fact of such dedication and the probability of its future acceptance into consideration, and if, in view of all the facts and circumstances, it was thereby depreciated, the amount of the depreciation might be properly deducted from what would otherwise have been the fair, full value thereof, including, in such valuation, the buildings and improvements thereon. The rule which prohibits an allowance for buildings erected on land laid down, as the site of streets, on the village map of Brooklyn, as declared in the *Matter of Furman street*, (17 Wend. 649,) does not apply to the proceeding. That is only applicable when the land is taken for a street; and until that time arrived, as was stated by Judge Bronson in his opinion in that case, it remained the property of the proprietor, "with the undoubted right to use it in any way that his interest or pleasure might suggest, with the single admonition, that if he made any erections on the site of the street he should not charge the expense to his neighbor, when it was opened."

Upon the application of the above principles to this pro-

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ceeding, it is evident that the commissioners have erred in allowing a nominal compensation only to the owners of the property taken, and the order, at the special term, confirming their report must be reversed, with \$10 costs on each appeal, to the appellants. An order must be entered to that effect, and denying the motion for confirmation, and referring it back to the same commissioners, for revision and correction, in accordance with the above principles, with liberty to correct the report, in any other particular, if they shall deem that course either necessary or proper.

The costs of the appellants, \$10 on each appeal, should be allowed to them, under the circumstances.

[KINGS GENERAL TERM, February 11, 1867. *Lott, J. F. Barnard and Gilbert, Justices.*]

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HUTCHINSON *vs.* THE MARKET BANK OF TROY.

Where a judge was requested to charge the jury that entries made by witnesses, in the books of a bank of what they swore they did, at the time, were evidence of the facts, and entitled to the same credit as their evidence, although the witnesses making the entries did not recollect them; and that such entries were more reliable than the recollection of the plaintiff, after a lapse of nearly six years; *Held* that such request was properly refused; and that it was correctly left for the jury to say, upon all the evidence, which was entitled to the greater weight.

The plaintiff claimed to have left a draft with a bank for collection, on the 24th of July, 1856. His bank book was written up as early as August or September, 1856, and balances were struck and the vouchers delivered up to him repeatedly, afterwards, until 1859, when he drew out of the bank the balance remaining to his credit. In September, 1856, he knew, or with reasonable attention might have known, that the draft was not credited to him on the books of the bank; yet he omitted to bring the matter to the notice of the bank until the spring of 1862. *Held* that this was a *stated account*, not objected to within a reasonable time; so clearly so, that it was not, under the evidence, a question proper for the consideration of the jury, whether the delay was sufficiently accounted for.

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*Held, also*, that the judge properly refused to charge that under the circumstances the plaintiff was *absolutely and conclusively* bound by the stated account, and could not recover of the bank the amount of the draft. The true rule in such cases is that the stated account is conclusive upon the parties, unless the plaintiff is able to impeach it by showing affirmatively fraud or mistake. A stated account never gives to a party claiming under it the benefit of an absolute *estoppel*. In practical effect it gives to him little more than these two advantages: 1. When the question arises upon the pleadings, the court has, in some instances, in granting permission to amend or reply, some equitable control over the power of opening accounts; 2. When the question arises upon the trial, the party impeaching the account has the affirmative of the issue, and the burthen of proof. *Per* HOGESBOM, J.

Where, in an action to recover a sum claimed by the plaintiff to be due to him, on the ground of an omitted credit, the defendant simply interposes the defenses of a general denial, and payment, and under the issues thus framed, the parties have investigated the whole case, on the trial, without objection, the defendant cannot afterwards be allowed to say it is not a case, *upon the pleadings*, for examining the question of fraud or mistake.

**A** PPEAL from a judgment ordered at the circuit, and from an order refusing to grant a new trial.

The action was commenced in July, 1862. The complaint alleges that the plaintiff was the owner of a draft, dated July 7th, 1856, for \$884, drawn by Samuel S. Whallon, canal commissioner, on the auditor of the canal department; that on or about the 24th of July, 1856, the plaintiff left this draft with the defendant for collection; that the defendant collected the draft and has never paid the same to the plaintiff. The answer, 1st. Denies the complaint; 2d. Sets up payment of the draft.

The action was tried at the Rensselaer circuit, November 22, 1865, by Justice MILLER and a jury, and a verdict rendered in favor of the plaintiff, for the amount of the draft and interest, upon which judgment was entered for \$1702.75 damages and costs. A motion was made at the circuit to set aside the verdict and for a new trial, which was denied. From that order, and the judgment, the defendant appealed.

The plaintiff is, or formerly was, a blacksmith, residing at Troy, and the defendant a banking corporation located at the same place. In 1856 the plaintiff was building bridges for

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the state, on the Erie and Oswego canals ; was paid by canal commissioners' drafts on the auditor of the canal department. The draft set out in the complaint, dated Mayville, July 7, 1856, was one of these drafts. The plaintiff received another draft from Henry Fitzhugh, canal commissioner, dated July 1, 1856, for \$853.47. They are so connected that the facts touching both require examination.

The plaintiff claims and swears that these two drafts were left with the defendant for collection, one on the 23d, the other on the 24th of July, 1856, and that he never has been paid the draft in suit. The defendant claims that neither of the drafts was left for collection, but that the draft in suit was received by it as cash and the money paid to the plaintiff on it some days previous to the 23d and 24th of July ; the other deposited by him as cash on the 24th of July, and he credited by the defendant with the amount on that day.

The plaintiff's case rested mainly upon his own testimony, fortified to some extent by that of Lynd, who had some interest in the draft. In 1856 the plaintiff had an account with the defendant, which was finally closed August 24th, 1859. At that time he kept no other bank account, was in the habit of negotiating these drafts with the defendant, and did not negotiate them elsewhere in Troy. The defendant's corresponding bank in Albany was the Bank of the Capitol. It had no other agent in Albany. The defendant sent to Albany, by express messenger, usually a couple of days before advised of the payment of drafts. The draft for \$853.47 was received by the defendant July 24, 1856. The plaintiff swears it was left for collection. This is denied, and made to some extent improbable by its being charged and credited on the exchange books of the two banks, and not on their ticklers, where it would have been placed if received for collection. The amount is also credited by the defendant to the plaintiff on the same day. For a statement of books kept by the defendant, the defendant introduced the evidence of Watson, its teller in 1856. They were kept in the ordinary

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way. In its dealings with the Bank of the Capitol amounts only were entered, without specifying for what; and the Bank of the Capitol kept its account with the defendant in the same way. In such dealings collections were entered upon the tickler, cash items upon the exchange book.

On July 15, 1856, the Bank of the Capitol was charged by the defendant, on its exchange book, with an item, among others, of \$884. July 16th the Bank of the Capitol received this remittance from the defendant, and on July 18th sent the defendant a remittance of twelve items, one of which was \$884. This remittance was received and credited by the defendant on the same day, and on July 24th, in a remittance by the defendant to the Bank of the Capitol of \$1789.85, made up of three items, the amount of \$884 again occurs; another of the items being \$853.47, (the other draft,) and another item, \$52.38. This remittance was received and credited by the Bank of the Capitol on July 25th. Both Banks treated the item \$884 as cash, by entering it on their exchange books. It was sent and returned as a cash item. Neither of the drafts appear on the defendant's tickler, where they should have been entered if received for collection. The \$853.47, it is admitted, was credited the plaintiff on the day named by the defendant, as cash. The plaintiff swears that this draft was not delivered to the defendant before July 23d. The plaintiff admits that *this* draft was first received; and further, he says: "It was spoken of at the time I left it, that it would not probably be paid, in consequence of the receipt not being signed by Mr. Lynd." There is a memorandum on the draft of \$884 as follows: "Mr. Hutchinson's assignee must sign the receipt, and indorse the draft, before it can be paid. Edw. James, acting auditor."

Watson, the defendant's teller, testified: "Have seen the original draft; saw that my indorsement had been erased and indorsed again after the name of Lynd. Mr. Gilbert was cashier of the Bank of the Capitol; the draft had been in-

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dorsed by him and his indorsement erased and repeated." Mr. Lynd swears : " Recollect I saw these two drafts there at the time ; recollect better now than on former examination ; when I brought him the \$853.47 draft he said that he had not yet received the money on the \$884 draft, and the Bank wanted the draft and me to give my name upon it ; went to the Bank and gave my name on it."

Mr. Lynd testified that the plaintiff told him he had not yet received the money. This witness says : " The \$884 draft had not, so far as I know, been to Albany when I was asked to sign it ; don't know that it had not." He says that it could not be he received the draft as early as 15th July. The witness testifies : " Am not sure I saw him (the plaintiff) do any thing with the \$884 draft. He wanted me to go to the bank and indorse it."

The plaintiff had a bank book ; received it some time in September, 1856 ; delivered him with checks and vouchers ; his account was written up from time to time, and book delivered with vouchers ; he closed his account August 24th, 1859, and drew balance ; he examined his bank book when he got it, in August or September, and noticed he was not credited with the \$884 draft. He testified : " I at that time remembered the history of the \$884 draft." The plaintiff made no claim until the spring of 1862, and then, as the defendant claims, he made none. Tappan swears : " He stated that he had got into a fog in his matters with Lynd, and wanted to know who got the money on those drafts." The plaintiff himself testified : " Lynd and I got into a dispute about who should draw the money on those drafts, \* \* \* my impression is that nearly four years elapsed before I satisfied myself about the draft. I went to the canal department, and found when these drafts went through. I immediately communicated with the bank about it ; spoke to Mr. Tappan." He admits, afterwards, in his cross-examination, that his interview with Mr. Tappan might have been in the spring of 1862, and Tappan swears it was. He knew the defendant

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had the draft, and noticed he was not credited with it on the bank book in August or September, 1856, and then, and until the spring of 1862, acted in accordance with the truth that he had been paid the money on the draft. He kept his account with the defendant for over three years after this, and finally closed it on August 24th, 1859. His bank book was written up and delivered him, with vouchers, from time to time, and when his account was closed and he drew his balance. He kept a book-keeper and books only up to June, 1856. The plaintiff kept memoranda on envelopes; they were burned in the fire of 1862. He testified as to the time of receiving these drafts, from the post marks on the envelopes. He swears: "I had a memorandum of the disposition made of these two drafts \* \* \* \* had no memorandum of the disposition of these drafts." He apprehended his account was short on first getting his bank book; he did not recollect the draft had been deposited with the defendant; remembered its history when Barker, the engineer, came; did not know that he had delivered the draft.

The parties having rested, and the testimony closed, the court charged the jury, and at the conclusion of its charge was requested by the defendant's counsel to further charge that if they found that the plaintiff's bank book was written up from time to time, so as to show the state of the account between him and the defendant, as claimed by the defendant, and was delivered to him with vouchers, it amounted to a stated account, by which the plaintiff was bound, unless he objected to it within a reasonable time; and that the plaintiff having made no claim upon the defendant until the spring of 1862, he did not object within a reasonable time, and could not, therefore, for that reason, recover in this action. The court refused so to charge, but did charge that the delay in objecting to an account thus made out and stated was to be considered by the jury, in weighing the testimony. The defendant's counsel excepted to the refusal to charge, and to the charge as made.

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The defendant's counsel further requested the court to charge the jury that a stated account furnished a merchant or business man by a bank with which he keeps an account must be objected to within a reasonable time, and cannot after that be brought in question, except on the ground of fraud or mistake, which is not this action. The court refused so to charge, but did charge as above ; and further, that it was for the jury to determine, upon the evidence, whether the plaintiff unreasonably delayed to assert any error, if there be any error, in the account with the defendant. The defendant's counsel excepted.

The defendant's counsel further requested the court to charge the jury that the closing of the plaintiff's account, finally, with the defendant, on the 24th of August, 1859, and drawing his check for the exact balance at that time, having his bank book written up and balanced and delivered to him with vouchers, was a final settlement, and was conclusive upon the parties, unless for fraud or mistake, which is not this action. The court refused so to charge, but did charge that these facts were to be considered by the jury in weighing the testimony, as before stated ; and the defendant's counsel excepted.

The defendant's counsel further requested the court to charge the jury that the entries proved to have been made by the witnesses Watson and Tappan in the books of the defendant, of what they swear they did at the time, were evidence of the fact or facts, and entitled to the same credit as their evidence, although the party making the entries does not now recollect them ; and that such entries are more reliable than the recollection of the plaintiff after the lapse of nearly six years. The court refused so to charge, but did charge that such entries were evidence, and were entitled to great weight, but that it was for the jury to say, upon all the evidence, whether they were entitled to more weight than the testimony on the part of the plaintiff. The defendant's counsel excepted.

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*O. F. Tabor*, for the appellant. I. The plaintiff's case rests entirely upon his own testimony. Our first point is, that it is not sufficient to sustain the verdict, and that the motion made at the circuit to set it aside should have been granted. (After reviewing the testimony.) The defendant, by the entries in its books, and in those of the Albany Bank, by the facts showing that this draft was sent back to be indorsed, and entries made such as this transaction called for, by the identity of amount, the settlement of the defendant's cash, and other proofs, makes a strong case; in fact, proved every thing possible under the circumstances; and to allow of a recovery against a bank, in such a case, and against such proofs, upon the vague recollection, or pretended recollection, of a party dealing with it, would be dangerous in the extreme. A bank could not, with any safety, pay a draft or a check upon another bank, without taking a voucher for the money.

The case, on the part of the plaintiff, rests upon his testimony, a new species of evidence, until recently excluded as unreliable and dangerous. Now, that it is admitted, it is the duty of courts to scrutinize it with care. This cannot always be expected of the jury.

The plaintiff was called upon, after his continued dealings, frequent settlements, and long delay, without making any claim, to prove his case by substantial, reliable evidence. He has not done it—his testimony will not bear examination. He undertakes, after six years, to remember what he could not remember before, without books or papers, or any thing to aid him, or refresh his memory. The proofs show that he was loose and erratic, without system, or business habits, and the verdict is clearly against the weight of evidence. In such case, this court say, in *Powell v. Jones*, (42 Barb. 28,) a new trial will be granted.

Where the evidence on behalf of the successful party does not establish the facts constituting his cause of action, or defense, beyond a reasonable doubt, the verdict can not be sustained. (*Sheldon v. Hudson River R. R. Co.*, 29 Barb. 226.)

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To justify a verdict, the law requires not positive proof, but such proof as will leave no reasonable doubt of the existence of the fact upon which it must rest. (*Id.* 229.)

Findings of fact plainly against the weight of evidence should be set aside on review. (*Mathews v. Poultney*, 33 Barb. 127. *Smith v. Tiffany*, 36 *id.* 23.) The case is not one of conflicting testimony where the evidence is nearly balanced, or one of doubt, as to the preponderance; but the verdict is clearly against the weight of evidence, and upon well established principles the defendant is entitled to a new trial.

II. The court erred in refusing to charge the jury as requested by the first, second and third requests. As to the first, the court erred in refusing to charge that the plaintiff was bound by a stated account, unless he objected to it within a reasonable time. His refusal to charge as requested, with instructions to the jury that it was to be considered by them, was equivalent to charging that a party is not bound by a stated account, if he does not object to it within a reasonable time, but that it is matter of discretion for the jury.

The court erred in refusing to charge the same thing contained in the second and third requests, and also in refusing to charge that it was necessary in the cases specified in these requests, in order that the plaintiff should not be bound thereby to prove fraud or mistake. (*Lockwood v. Thorne*, 1 Kern. 170. *S. C.* 18 *N. Y. Rep.* 285. 30 *id.* 202.)

The court erred in refusing to charge according to the fourth request, in respect to both of its propositions.

If the requests to charge by the defendant were correct, they should have been assented to by the court. To refuse to charge a proposition where the party is entitled to it, is not cured by further instructions to the jury from the court, should they be held equivalent to what was requested. Such a course is almost certain to prejudice the case, and to mislead the jury.

The charge here will be found incorrect, in both what is charged and refused.

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*W. A. Beach*, for the respondent. I. It is questionable, whether the defendant is formally in position to ask a review of the facts by the appellate court. He has no order from which to appeal. The case states that he moved on the minutes for a new trial—that his motion was denied, and he excepted. He appeals from that ruling as an order. The practice is exceptional.

II. The issues of fact were submitted to the jury upon conflicting testimony, of which, it may, at least, be said that there was no decisive preponderance in favor of the defense. The case is therefore one of those, where the verdict is conclusive. Upon a former trial, a jury had disagreed. The verdict obtained by the plaintiff was upon a full and deliberate presentation, the parties being aided by the developments and arguments upon the first trial. To justify its reversal upon the proofs, it must appear to be clearly and inexcusably against the weight of evidence. Certainly, this cannot be pretended. It will be seen, I think, that the balance of proof was with the plaintiff. At any rate, it is indisputable that his case was sustained by the positive and unimpeached testimony of himself, and another, which was answered only by inconclusive inferences from the books of the defendant. If it may not be said, that an interference with the verdict, under such circumstances, would be in disregard of evidence, it may be said that it would be a departure from the settled doctrine and uniform practice of this court.

III. The verdict is in decided conformity with the evidence. 1. The ownership in the plaintiff, of the draft, its deposit with the defendant, by the plaintiff, July 24th, 1856, its collection by the defendant, are unquestioned facts. It is undenied, that it was not credited to the plaintiff, on the books of the bank. It is not pretended that it was passed to the defendant, in liquidation of any debt of the plaintiff, or any special account. The sole question is, did the bank pay the plaintiff, over its counter, the amount of the draft, when it was received? The defendant claims that it did so.

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The plaintiff avers that it was delivered, and received for collection, denying that the defendant has accounted for the avails. 2. The plaintiff swears, positively and unequivocally, that he passed the draft to the defendant on the 23d or 24th July, 1856, for collection, and that he has not received any credit or payment on account of it. 3. John A. Lynd, who was interested in the draft, by way of security for advances made the plaintiff, swears that on the 23d July, 1856, the plaintiff extinguished his interest in this and other drafts; that on the 24th July he went to the defendant's bank to indorse the \$884 draft, and did so; that he received no money from the defendant upon it, nor did the plaintiff, in his presence. The plaintiff was uncertain, whether this draft was delivered to the defendant on the 23d or 24th July. The defendant's exchange book shows an item of \$884, both on the 15th and 24th July. Lynd swears that he had a settlement with the plaintiff on the 22d July, and that this draft, with another, was received the next day. His recollection as to that, is confirmed by the check given him by the plaintiff. It is certain, therefore, that the entry on the defendant's books of July 15th, had no connection with the draft in question. It is probable that the entry under date of July 24th, represents it, confirming the first impression of the plaintiff, that both the drafts of \$853.47, and \$884, were delivered to the defendant on the morning of the 24th July. 4. The plaintiff swears, and it is undisputed, that on the 23d July, he requested Watson, the defendant's teller, to furnish him a bank book, embracing all his account. That he then informed the teller that he desired *all his drafts to appear*. The plaintiff then gave a balance check ante-dated to June 23d, a date overreaching all the drafts negotiated with the defendant. It is further undisputed, that such bank book was supplied, commencing June 27th, 1856. And that under date July 24th, 1856, the draft of \$853.47 is credited, no credit appearing for the one of \$884. It is certain that both these drafts were at the bank on the morning

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of the 24th July. The plaintiff and Lynd so testify, and there is no contradiction. How came these drafts, thus associated and connected on the plaintiff's exchange book, separated? The defendant answers that it paid the money on the one to the plaintiff, at the time. This is contradicted both by the plaintiff and Lynd. It is contradicted, also, by the known custom of all banking institutions, with their regular customers. Drafts deposited, for which money is paid on the instant, are always paid upon the customer's check, and both draft and check entered to his account. Especially would this be so between these parties, the defendant knowing that the plaintiff desired all his drafts entered upon his bank book, and, indeed, that it was procured for that purpose. 5. In answer to this proof, the defendant produces Mr. Watson, its teller, by whom the business was transacted, on its part, who swears that he does not recollect of paying the \$884 draft to the plaintiff or Lynd; that there is no entry on the book which shows that he paid the money on the draft; and that he can not swear that he did pay it over the counter to the plaintiff, or anybody else. The remainder of the defendant's proof is derived from its books. It is circumstantial and argumentative. The books do not show, by direct entry, or positive deduction, what disposition was made of the \$884 draft. It is said that its appearance upon the exchange book indicates that it was regarded as a cash item, and that the proven fact of the correct daily balancing of the cash account necessitates the same conclusion. If the conclusion be conceded, it by no means answers the direct and positive proof of mistake furnished by the testimony of the plaintiff and Lynd, supported by the circumstances before considered, especially as the evidence of the defendant's teller shows that the error claimed by the plaintiff might well exist, consistently with the treatment by the defendant of the draft, as a cash item. In the first place, whatever may be the probability, it is not certain that the item of \$884 appearing on the exchange books, under date of July 24, 1856,

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consisted of the \$884 draft. Mr. Watson swears that he cannot tell of what the item consisted ; that it might be cash for aught he knew. He says this with the books before him, and with knowledge of the defendant's course of business. If nothing more, this proves the unreliability of the books, and in connection with the other testimony of Mr. Watson, before quoted, shows further, that all inferences deduced from the books are uncertain and hazardous. Other testimony of Mr. Watson is significant. He says he means by a cash item, one for which money was paid, or credit given. So that if, by mistake, this \$884 draft was credited to the wrong account, treating it as a cash item would produce no confusion or irregularity in the accounts. And Mr. Watson also shows that if it was credited to some other person than the plaintiff, he could not detect it in settling his cash account. The whole argument from the books, and from the accurate balancing of the cash, is answered by the single suggestion, that the draft was erroneously credited to some other account than the plaintiff's. It became, therefore, important for the defendant to show, in aid of its argument from the books, that this credit was not improperly applied. This was entirely practicable. No proof of the kind was given. The books produced did not elucidate the question. It was not even shown that this draft was not credited to Lynd. Such an error might readily occur. He was known assignee of the paper ; his name was upon it ; he was present when it passed to the defendant ; and Mr. Tappan, defendant's cashier, when applied to by the plaintiff concerning the error, claimed that this draft belonged to Lynd. For aught that appears, it may stand credited to Mr. Lynd, and if so, or to any other party, every argument of the defendant is fully answered. This view also meets the argument, vigorously pressed upon the jury, that a verdict for the plaintiff was a substantial conviction of Mr. Watson (the teller) for felonious embezzlement of the amount of the draft. Obviously, no such consequence follows. An innocent mistake, assumed probable in

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itself, reconciles all the evidence. But if this judgment conveys imputation upon any officer of the defendant, it is sustained by evidence too credible and irrefragable to be disturbed for that reason; and an argument of this character, quite illogical in itself, is decisively disposed of by the consideration that the success of the defendant would unavoidably impute perjury to the plaintiff, and possibly to Mr. Lynd also.

IV. The remaining question arises upon the charge of the judge, and refusal to charge, presenting, for consideration, the doctrine of stated and settled accounts.

It appeared that the plaintiff first received his bank book from the defendant in August, or September, 1856, although the entries on it commenced in June preceding, at which time he closed his account and drew his balance. And that the plaintiff's first application to the defendant on account of this draft, was some four years afterward, or, possibly, in the spring of 1862. In answer, it was shown that the plaintiff was not familiar with book keeping, and not in the habit of keeping books, and that he kept a book keeper, and books only to June, 1856. That he was a blacksmith by trade; but in 1856 was contractor with the state, for the erection of iron bridges over the Erie and Oswego canals, for which he was paid by drafts, of the character in question. That he received these drafts every month of the year, to the amount, from January to June, 1856, of \$30,000. The balance to his credit on the books of the bank, in July, 1856, was \$24,281.35, and in August, \$5049.17. Under this state of facts, the defendant contended that the account between the parties was so stated, and settled, as to conclude the plaintiff from all allegation of error. On the contrary, the plaintiff insisted that the proof was abundant to carry the question of unreasonable delay in asserting the mistake to the jury. The defendant's first request to charge, required the court to say as matter of law to the jury, "that the plaintiff, having made no claim upon the defendant, until the spring of 1862, he did not object within

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a reasonable time, and cannot, for this reason, recover in this action." This the court declined, leaving the question to the jury. Undoubtedly this was a correct disposition of the power, unless the evidence was so decisive, as to justify the court in directing a verdict for the defendant. That part of the first request, preceding the above extract, was entirely unexceptionable, but to sustain an exception, it must be so in all its parts. The court was not called upon to qualify the proposition, by distinguishing the good from the bad, although it did so. (*Doughty v. Hope*, 1 *N. Y. Rep.* 79.) The defendant's second request, claimed a ruling to the effect that this action was not so framed that the plaintiff could recover, although he proved a mistake, and reasonable diligence to obtain its correction. The proposition, that a stated account must be objected to in a reasonable time, and could not be questioned but for fraud, or error, was entirely accurate; but the defendant asked the court to rule that this action did not present the question of an account stated. The complaint alleges that the plaintiff deposited the draft in question, with the defendant for collection; that the defendant collected it, and never paid the avails to the plaintiff, but converted them to its own use. The answer avers payment, with a general denial. Clearly, the complaint was formally and substantially sufficient to authorize a recovery. It stated, precisely, the facts upon which the plaintiff's claim rests upon the proof. It was not for him to allege a mistake. It is enough that he alleges, and proves, that the defendant, as his agent, collected for him money, for which it has neglected to account. An action within six years entitled him to judgment. It is the defendant who relies upon a stated account. The defense, argumentatively admitting the collection of the plaintiff's money, and failure to account, attempts to bar his action, because he did not claim his money seasonably. It might, with plausibility, have been objected, upon the trial, that the answer avers no such defense. Certainly, the defendant cannot object that it was considered. If otherwise,

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the issue of settled accounts, in all its aspects, was litigated without objection, until it came to the requests to charge. After the defendant found the issue to be against it, upon two trials, and full discussion, it attempts to escape it. Under these circumstances, if the pleadings were defective on either side, the court would conform them to the proofs. It will be presumed to have been done in support of the judgment, and if not, will be done on appeal. (*Lounsbury v. Purdy*, 18 *N. Y. Rep.* 515, 521. *Bate v. Graham*, 11 *id.* 237, 242.)

The third request, is substantially the same as the second. It is submitted, that the single legal proposition debatable, is offered under the first request to charge. The only disputed point arises upon the submission of the question of *delay* to the jury. The court properly instructed them, that the facts showed an account stated; that it was conclusive upon the plaintiff, unless objected to in a reasonable time; and that it was for them "to determine upon the evidence, whether the plaintiff unreasonably delayed to assert any error, if there be any error, in the account with the defendant."

The direction given to the case by the learned judge at the circuit, follows strictly the path of the highest authority. (*Lockwood v. Thorne*, 11 *N. Y. Rep.* 170. *S. O.* 18 *id.* 285. *McDougall v. Cooper*, 31 *id.* 498.) The opinion of Justice Parker, in the authority first cited, is not as satisfactory as that of Justice Selden upon the second appeal in the same case. Justice Parker (*p.* 173) assumes that the record shows that there was no proof of fraud or mistake, as the case was then presented. And then holds that the question, "whether, on a given state of facts, the transaction amounts to an account stated, is a question of law, and not of fact." This may be conceded, without affecting this appeal. Here, decisive proof of mistake, or fraud, was given, and the only point of law raised was, whether or not that being shown, and long delay in asserting it appearing, it was proper to submit to the jury, upon explanatory testimony, the sufficiency of the

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excuse offered for the delay. Further on, in his opinion, (p. 174,) Justice Parker concedes that in the absence of express admission, the conclusiveness of the account depends upon the timeliness of objection to it. It is true, the verdict for the plaintiff, who claimed the error, was set aside, Justice Parker holding that the delay of nine months, and drawing a draft for the balance, was conclusive evidence, that the plaintiff agreed to the bill rendered, as a stated account. (Page 175.) But he then says, "the transaction, then, being an account stated, is conclusive upon the parties, unless the plaintiff affirmatively shows fraud, or mistake. \* \* Here, no fraud or mistake was pretended." On the new trial, the plaintiff was nonsuited. The circuit judge, misapprehending, I think, the opinion of Justice Parker, held the plaintiff concluded by the account, and granted a nonsuit. (18 N. Y. Rep. 287.) On appeal, the nonsuit was set aside, Justice Selden, with his usual force and precision, (p. 291,) announcing the sensible and just rule, that "an account stated, or settled, is a mere admission that the account is correct. It is not an estoppel. The account is still open to impeachment, for mistakes, or errors," &c. (p. 292.) He proceeds to demonstrate that the effect of an account stated, and settled, is a matter of evidence, and depends upon the attendant circumstances. Justice Pratt, referring to the decision on the first appeal, says, "there is nothing in that decision, however, which would preclude the plaintiff from showing upon the second trial that they did, in fact, object within a reasonable time, or any legitimate cause for not objecting," &c. (p. 290.) His opinion (pp. 288, 289) is equally explicit, in considering the whole question one of fact, to be settled upon consideration of all the circumstances.

The case of *McDougall v. Cooper*, (*supra*), is still more decisive. There a note was given on the settlement of accounts, and afterwards paid. The plaintiff sued as assignee in trust. The defendant was allowed to show mistakes without any explanation whatever, qualifying the effect of the settlement,

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and note given. The time that had intervened does not distinctly appear. The report does not show when the suit was commenced. The settlement was in May, 1848. Judge Denio's dissenting opinion states, (p. 503,) that evidence was given of a paper executed in 1852. The suit was, therefore, four years after the settlement. The court says, (p. 499,) "The principal issue of law was, admitting that there were errors, omissions or mistakes, on such accounting, was not the plaintiff barred and precluded from opening the account, and receiving any balance found due by reason of such omission, or mistake, by the duebill given, and the receipt thereon?" And it sustained the finding of the referee, allowing the mistakes. This was in March, 1865. In the following year, (March, 1866,) in the Supreme Court, in the seventh district, the same doctrine was affirmed, although the court set aside the judgment upon the evidence. In that case the delay was nearly six years; and yet the court held the account open to impeachment, without hinting at the necessity of explaining the delay. (*Towsley v. Denison*, 45 Barb. 490.)

It would seem clear that no error, prejudicial to the defendant, occurred upon the trial. It may be doubted if a party prosecuting within the statute of limitations for money due, is, under any circumstances which do not amount to an express agreement, or an *estoppel in pais*, barred of his right by an account stated and settled, which is clearly shown to be erroneous. Such an estoppel rests upon no principle of law or equity. Why should the party to whom money is justly due be estopped by an error to which he has not understandingly agreed, and out of which no equity has arisen in favor of his adversary? Suppose the error was seasonably discovered, or ought to have been, and the claimant was dilatory and negligent in obtaining its rectification, yet if he acts before he is bound by the statute, what conceivable reason can be given why he should not assert the mistake?

It may be said that parties rely upon closed accounts—that they become stale and forgotten—and injustice may

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follow their opening. These are considerations relating exclusively to matters of evidence, and requiring more satisfactory proof of mistake. But the mistake being shown, nobody can maintain otherwise than as an arbitrary and senseless dictum, that it ought not to be rectified, because the wronged party has delayed the assertion of his right. The statute of limitations is the only bar, and that is arbitrary. Time does not sanctify error and wrong. The statute is peremptory; but short of that, there is no mere delay, unaccompanied by agreement or equitable estoppel, which bars any demand of this nature.

At all events, it does not when it is explained and shown, as in this case, not to have been an acquiescence in a known mistake, ripening into an implied agreement, but an excusable delay, founded in ignorance of the truth, and occupied in fruitless but ceaseless efforts to ascertain it.

HOGEBROOM, J. The defendant's counsel made four several requests to charge the jury, which it may seem better, to illustrate the case, first to consider.

The request to the court to charge absolutely that the entries by Watson and Tappan in the books of the bank were more reliable than the testimony of the plaintiff, after the lapse of six years, was properly refused, and it was properly left for the jury to say, upon all the evidence, which was entitled to the greater weight. This is so obviously the correct rule that it scarcely needs illustration. A contrary instruction, if positive and absolute, would probably have entitled the plaintiff, if defeated, to a new trial.

The second and third requests are faulty, I think, for containing the clause "which is not this action." If by that it was meant that it was not competent for the plaintiff to raise the question of fraud or mistake, because it had not been made as a distinct issue in the pleadings, the position was not well taken. The plaintiff could doubtless have framed a complaint alleging in terms that there had been an account

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stated between the parties, and setting forth circumstances of fraud or mistake therein as a ground for opening the same and reinvestigating the items thereof. And a denial of the allegations would have raised an issue upon which the parties might have gone to trial and introduced, probably, nearly the same evidence which they brought forward on this occasion. Or, the plaintiff might properly, I think, as he has done in this case, have framed his complaint to recover a specific sum—a single item—claimed to have been owing from the defendant to him ; leaving the defendant to set up a denial, or a payment, or an account stated, as the fact might be. A statement of the latter fact would be *presumptively* a bar, and would throw upon the plaintiff the necessity—if he wished simply to deny that there was an account stated—of raising that question, by an omission to reply, or by a reply containing a general denial of the answer ; or if he wished to open the account to re-examine the items on the ground of fraud or mistake, to amend his complaint or reply specially by permission of the court, setting up circumstances of fraud or mistake, in the nature of a *surcharge* or *falsification*, according to the practice of a court of equity. In this particular case, the claim being for an *omitted credit*, it would have been in the nature of a *surcharge*. But the defendant did not adopt this course, and interposed simply the defenses of a *general denial* and *payment*. Under issues thus framed, the parties have *mutually* and *without objection* gone into the whole evidence in the case. It is not, I think, for the defendant to complain that this has been done. *Perhaps* the plaintiff might have objected that if the defendant wished to rely upon an account stated, he should have interposed it as a *specific defense*. But the question does not arise. Both parties have investigated the whole case, on the trial, with the utmost freedom, and without a particle of objection, and they cannot now be allowed to say this is not a case, *upon the pleadings*, for examining the question of fraud or mistake.

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If he intended by this language, "*which is not this case,*" to say it was not a case of fraud or mistake upon the *evidence*, that is that the *evidence* did not exhibit *any* circumstances tending to show *mistake*, I think the objection was not well founded in fact, so far as to prevent their submission to the jury, and therefore a compliance with it was properly refused.

I have more doubt about the *first* request, and whether the judge, at the circuit, ought not to have granted it. It consisted of two propositions: 1st. That if the plaintiff's bank book was written up from time to time, so as to show the state of the account between the two parties, and delivered to him (the plaintiff) with vouchers, it amounted to a stated account *by which he was bound*, unless he objected to it within a reasonable time; and, 2d. That the plaintiff having made no claim upon the defendant until the spring of 1862, *he did not object within a reasonable time*, and could not therefore, for that reason, recover in this action.

The plaintiff's counsel pronounces the first branch of this request "entirely unobjectionable," but attacks the latter as unsound. I regard the plaintiff as without any reasonable excuse for allowing the matter to be so long unquestioned. His bank book was written up as early as August or September, 1856, and balances struck, and the vouchers delivered up, repeatedly afterwards, until 1859, when he drew out of the bank the balance remaining to his credit. In September, 1856, he knew, or with reasonable attention might have known, and was bound to know, that the draft in question was not credited to him on the books of the bank. It is no sufficient apology for his remissness to say he was not learned, or was otherwise employed. He was bound, by all the rules which regulate commercial transactions, to give attention to this business, and if necessary, to obtain the services of a competent assistant for the purpose. If he was not persuaded of a fact of which on this trial he was so positive—that the paper had come into the possession of the defendant—that is another question. That casts a doubt over his accuracy in

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the whole transaction. But even that is but a lame apology for letting the matter lie till the spring of 1862, before he brought it to the notice of the bank. Upon all the principles applicable to transactions of this kind, this was, in my opinion, clearly a *stated account*, not objected to within a reasonable time ; so plainly so, that it was not, under the evidence, a question proper for the consideration of the jury whether the delay was sufficiently accounted for.

Differing on this point from the judge who presided at the trial, let us see whether the defendant has taken any available exceptions on this branch of the case. It has excepted to the charge of the judge that the delay in objecting to an account thus made out *and stated*, was to be considered by the jury in weighing the testimony. In this there was no error. It was to be considered, and very seriously considered ; so much so as to throw great discredit upon the plaintiff's case. The charge, in this clause of it, was not equivalent to a submission of the question to the jury to determine whether the delay was so unreasonable as to forbid a recovery by the plaintiff. That, I think, would have been error, but not to say to them, in effect, that the delay in objecting to the account detracted from the strength of the plaintiff's case. In the refusal to comply with the second request, the judge laid down the rule more broadly, and, as it seems to me, erroneously, in saying "it was for the jury to determine upon the evidence whether the plaintiff unreasonably delayed to assert any error in the account with the defendant." But I find no specific exception limited to this clause of the charge. The case states, immediately after the last sentence, "and the defendant's counsel then and there duly excepted." But the previous sentence, to which that exception is applicable, contains not only the clause above quoted, but a refusal to charge, and a charge in both of which the judge was, in my opinion, correct. The exception must therefore fail, *for being too comprehensive*.

The first branch, and the latter part of the second branch,

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of the request, asked the judge to charge that under such circumstances, the plaintiff was bound by the stated account, (that is as I understand it) *absolutely* and *conclusively* bound and could not recover. I think this was a more rigid penalty than the law imposed. The true rule is more nearly stated in the second and third requests, that the stated account becomes conclusive upon the parties unless impeached for fraud or mistake. In the language of the opinion in *Lockwood v. Thorne*, (11 N. Y. Rep. 175,) "the transaction then being an account stated, is conclusive upon the parties, unless the plaintiff affirmatively shows fraud or mistake." So in Judge Selden's opinion in the same case, in 18 N. Y. Rep. 292 : "An account stated or settled is a mere admission that the account is correct. It is not an estoppel. *The account is still open to impeachment for mistakes or errors.*" "But the parties are never precluded from giving evidence to impeach the account, unless the case is brought within the principles of an estoppel *in pais*, or of an obligatory agreement between the parties ; as, for instance, when upon a settlement mutual compromises are made." (See further, *Murray v. Toland*, 3 John. Ch. 569 ; *Wilde v. Jenkins*, 4 Paige, 481 ; *Philips v. Belden*, 2 Edw. 1.)

The result is that a stated account never gives to a party claiming under it the benefit of an absolute estoppel, and in practical effect gives him little more than these two advantages : 1st. When the question arises upon the pleadings, the court has, in some instances, in granting permission to amend or reply, some equitable control over the power of opening the accounts. 2d. When the question arises upon the trial the party impeaching the account has the affirmative of the issue, and the burthen, and sometimes an oppressive burthen, of proof. These are considerable advantages, but they come very far short of placing the adverse party under the bar of an absolute estoppel. On the whole, therefore, I think this request, for the reason just stated, was also properly refused.

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Nor do I think, whatever may be our opinion of the merits of the case, that we can consistently with the rules of law, grant a new trial upon the ground that the verdict is against the weight of evidence. 1st. The plaintiff—and to some extent he is corroborated by Lynd—swears explicitly that he delivered this draft to the defendant, and that he has never had from it either payment or credit. None of the officers of the bank swear explicitly that this is not so, and all were not examined upon this subject who might have been. The lapse of time, and the stated account, are strong circumstances against the plaintiff; but we can scarcely say, under the positive testimony of the plaintiff, that the bank has had the draft and has not accounted for it, and a failure to contradict it by testimony equally explicit, that the weight of proof is so clearly with the defendant as to require us to set aside the verdict.

2d. This draft is clearly enough traced into the possession of the defendant. The plaintiff swears to it, and the defendant does not deny it. It is highly probable, not to say absolutely certain, that it passed between the defendant's bank and the Bank of the Capitol, at Albany. The respective theories in regard to it are, 1st, that of the plaintiff, that it was received by the defendant for collection and never accounted for; and 2d, that of the defendant, that it was received as cash, and accounted for at the time. There certainly are some circumstances tending to show that the plaintiff is mistaken in supposing that it did not go into the hands of the bank till the 23d or 24th of July; for an item of precisely that amount passed on the 15th from Troy to Albany, in the exchanges between the Market Bank and the Bank of the Capitol, and it was entered in the exchange account and not on the tickler, indicating it to be a cash item. And to make that more absolutely certain, it would have been more satisfactory if the defendant had given evidence to show that the item did not, after the 24th, again appear on its exchanges with the Bank of the Capitol. Indeed I think it somewhat

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remarkable that the case does not explicitly state, and that proof was not given, that no further or other account of this item appears on the books of the bank; or that the state of the account of Lynd, as well as of Hutchinson, and perhaps that of some other parties, was not examined at about that period of time—from the 15th to the 25th of July—for the purpose of ascertaining whether by possibility some mistake had not occurred, in regard to the disposition of this item, which would tend to promote justice between these parties.

The theory of the defendant is that this draft may have been, though not sworn to that it actually was, treated as a *cash* item, and paid over the counter of the bank to the plaintiff, in cash, and not in any way entered or necessary to be entered on the books of the bank. And it would not have been improper, or unnatural, so to have entered it. It was very likely to be so entered, as the plaintiff was an habitual dealer and customer at the bank, making frequent if not daily deposits and drawing frequent if not daily checks. I think there is no evidence to show that in any other instance the defendant paid any of the canal drafts to the plaintiff in that way. And the draft of \$853.49 which, as the defendant says, was treated by the bank as a cash item, was nevertheless credited to the plaintiff on the books of the bank.

3d. There are undoubtedly some difficulties in sustaining the theory of the plaintiff, and some improbabilities in some of the circumstances testified to, and great lapse of time allowed to occur before an investigation is demanded; but there are also counter difficulties and counter improbabilities in the theory of the defendant—an absence of positive testimony—and a lack of that full examination and presentation of facts which, I think, the circumstances of the case called for.

The case has been once tried without reaching a verdict, and again tried with a result unfavorable to the defendant. I am not prepared to say that we ought to interfere to set that verdict aside. The case, in any aspect of it, is attended

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with doubts and uncertainties, and the plaintiff has this advantage in the clearly established facts of the case, that the draft belonging to him went into the defendant's possession.

I think the verdict cannot be disturbed, and that the judgment must be affirmed.

MILLER, J. I think that no error of law was committed upon the trial of this case. And although not entirely satisfied with the verdict of the jury, I do not well see how, according to well settled rules of law, it can be disturbed. I therefore concur in the result of the foregoing opinion.

PECKHAM, J. dissented.

Judgment affirmed.

[ALBANY GENERAL TERM, March 4, 1867. *Peckham, Miller and Hogaboom, Justices.*]

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MARGARET WILCOX, adm'r of Milton P. Wilcox, appellant,  
vs. CATHARINE WILCOX and others, respondents.

The law will not imply a promise to pay for board or services, as among members of the same family, and persons more or less intimately or remotely related, where they are living together as one household, and nothing else appears.

One tenant in common, although he have the exclusive possession of the common property, is not liable to account to the other tenants in common either for rent or for a share of the profits; unless there be an express agreement that he shall do so.

Where a married woman is a tenant in common with others of property occupied by her and her husband, his occupation being that of his wife, no action will lie against him by the other tenants in common, for rent, without proof of an agreement to pay it.

THIS is an appeal from the final decree of the surrogate of Monroe county, settling the accounts of Margaret Wilcox, as administratrix of Milton P. Wilcox, deceased, in which her rights and duties as such administratrix, and

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as heir at law of her father, Isaac B. Cole, and as legatee in his will named, are involved, and were necessarily passed upon by the surrogate. Isaac B. Cole died at Perinton in the year 1862, leaving a will, and leaving Cynthia Cole, his widow, Henry Cole, his son, and Margaret Wilcox, his daughter, and heirs at law, and legatees named in his will. Margaret, at the time of her father's death, had been married to Milton P. Wilcox, the intestate, for several years, and had never left her father's house; her husband went into Cole's family and lived there, with his wife. For the last two years of Cole's life he also had a horse kept there by Cole. After the death of Cole, the intestate went on to the farm by and with the consent of all the owners, Mrs. Cole, Henry Cole and Mrs. Wilcox, under no specially expressed bargain. Milton P. Wilcox died intestate in the year 1864, leaving Margaret Wilcox, his widow, but no children, but leaving the respondents, who were his brothers and sisters, his heirs at law. Mrs. Cynthia Cole became the administratrix of her husband, I. B. Cole, and presented to Margaret Wilcox, as the administratrix of Milton P. Wilcox an account against the estate of Wilcox, which included an item for board and horse keeping, \$800 and interest. This item Mrs. Wilcox paid by giving her note, and took a receipt, and presented it as one of the items against the estate of her husband; but it was disallowed by the surrogate. Another item in the account of the administratrix of Wilcox was a claim of \$1593 for the rent of the farm two years, while it was occupied by Wilcox, with interest.

Mrs. Wilcox and her brother Henry had bought this claim from Mrs. Cole and taken an assignment of it, and presented that as a claim against the estate, including her proportion of the rent. This was also disallowed by the surrogate, as to so much as was claimed for Mrs. Wilcox.

From the decision of the surrogate in these two matters Mrs. Wilcox appealed to this court.

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Wilcox v. Wilcox.

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*Wm. C. Rowley*, for the appellant.

*J. L. Angle*, for the respondent.

*By the Court*, E. DARWIN SMITH, J. The surrogate was clearly correct in disallowing the claim of \$800 for board and horse keeping. The proof showed that upon the marriage of Milton P. Wilcox with Margaret Cole he lived at his wife's father's and made it his home there, by invitation and common consent, without any claim, suggestion or expectation by any one that he was to pay for the board of himself and wife. No agreement for board is proved; and without an express agreement to pay for board no legal claim arose, and none should be recognized or allowed, under such circumstances. The case of *Robinson v. Cushman*, (2 Denio, 153,) fully asserts this principle, and it is eminently sound and just. The law will not imply a promise to pay for board or services, as among members of the same family and persons more or less intimately or remotely related, where they are living together as one household, and nothing else appears. (*Williams v. Hutchinson*, 5 Barb. 124. 17 Verm. R. 556. 16 id. 150. 3 Cowen, 612. *Dye v. Kerr*, 15 Barb. 444.)

The surrogate also correctly held that the claim of the heirs and devisees of I. B. Cole, for rent of the farm occupied by Wilcox, was not recoverable, so far as related to the one third of the amount claimed by the appellant; and for the same reason he should have disallowed such claim so far as related to the residue of such claim for rent. No portion of such item for rent should have been allowed. Wilcox occupied the farm in the right of his wife, who was a tenant in common with Cynthia and Henry Cole. His occupation was her occupation, and as no action would lie against her for such occupation, it would not lie against him, without proof of some agreement to pay rent. The surrogate held the law to be—and in this he was clearly right—that one tenant in common, although he have the exclusive possession

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of the common property, is not liable to account to the other tenants in common either for rent or for a share of the profits, unless there be an express agreement that he shall do so. (*Henderson v. Eason*, 9 Eng. L. and Eq. 339. *Woolever v. Knapp*, 18 Barb. 265. *Dresser v. Dresser*, 40 id. 300.)

It appears that on the decease of the father of Mrs. Wilcox the remainder of the family, consisting of her mother and one brother, all lived together on the farm, and the intestate Wilcox carried on the farm. This was at the request and by the advice of Cole, the father of the appellant, in his lifetime, and apparently by common consent and for the common benefit, so far as they all lived upon the farm and from the farm. Wilcox did not become liable to pay rent because he was there employed in preserving the common property and cultivating the farm in the right of his wife, because the head of the household, for the common benefit of all the parties interested in the property upon the decease of the appellant's father. This whole claim for rent should have been disallowed, and as the respondents make this claim in their answer to the petition of appeal under rule 44, the decree can be so modified, and with this modification it should be affirmed, with costs to be paid by the appellant.

[MONROE GENERAL TERM, March 4, 1867. *Wells, E. Darwin Smith and Johnson*, Justices.]

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McKECHNIE and others vs. STERLING.

An absolute contract for the sale of an interest in land, authorizing the purchaser to take immediate possession, the consideration to be paid on demand, vests in the purchaser the equitable interest in the land the moment it is executed and delivered.

Such an agreement is not a covenant for the immediate possession, or a condition therefor, the breach of which will avoid the contract.

The destruction of the building on the premises, by fire, after the making of such a contract, is no defense to an action for the purchase money; the purchaser being the owner thereof, and having an immediate interest therein.

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McKechnie v. Sterling.

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**A**PPEAL by the defendant from a judgment entered on the verdict of a jury. The action was brought to recover the sum of \$200, the consideration agreed to be paid by the defendant on the purchase of an interest in real estate. The plaintiffs, in their complaint, alleged that on or about the 3d day of June, 1862, the plaintiffs being the owners of a certain building situated upon premises of Caroline and Julia W. Jackson, on the east side of Main street in the village of Canandaigua, and being the holders of a lease of said lot for the ground rent of \$70 per year, payable semi-annually, which lease extended for the period of two years from the first day of March, 1860, the rent to commence from the 17th of April, 1860, and which lease had been extended for the period of one year from the first of March, 1862; and being copartners, doing business under the name, firm and style of J. & A. McKechnie, made and entered into an agreement and contract of sale with the defendant, signed by the parties, of which the following is a copy:

"This agreement, made this 3d day of June, 1862, between James McKechnie and Alexander McKechnie, of Canandaigua, Ontario county, New York, of the first part, and Stephen L. Sterling of the same place, of the second part, witnesseth, that in consideration of two hundred dollars agreed to be paid by the said Sterling, the parties of the first part do hereby agree to convey to said Sterling all their right in the property now owned and rented by the parties of the first part, and occupied by J. G. Wilson for a meat market, on the east side of Main street, nearly opposite from Chapin street in the village of Canandaigua, and hereby authorize him to take possession of said premises and building immediately. In witness," &c.

That at the date of said agreement the said building and premises were occupied by one J. G. Wilson as recited in said agreement; that the defendant made said purchase, agreeing to take the risk of obtaining the unexpired right and possession of the said premises from said Wilson; that very soon after the making of said agreement, the defendant

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McKeehnle v. Sterling.

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made arrangements with Wilson, by which the defendant was let into full possession of the said building and premises, and the plaintiffs have not since had the enjoyment, or occupation, or rents or profits of the same, or any part thereof. That after the making of said agreement, and on or about the 18th of August, 1862, they tendered to the defendant a release and quit claim of all their interest in said premises and property, and an assignment of the unexpired term of said lease so held as aforesaid, and demanded of the defendant the payment of said sum of \$200, which he refused to pay, and refused to accept said release and assignment, or in any manner to comply with the said agreement on his part; that the plaintiffs have fully performed said agreement on their part, and in consequence of such refusal on the part of the defendant, the plaintiffs have been compelled to pay and have paid the rent for said premises for the remainder of the said term, from June 3d, 1862, to March 1st, 1863, amounting to \$52.50, which, by the terms and true intent of the said agreement, the defendant should have paid, and which, together with the said \$200 and the interest thereon, the defendant, though often requested, has refused, and still refuses to pay to the plaintiffs.

Wherefore, the plaintiffs demanded judgment and claimed to recover of the defendant \$200 and interest from the 3d of June, 1862, and \$52.50, with interest from the 1st of March, 1863, besides costs.

The defendant, by his answer, admitted the making of the agreement, and that at the date of said agreement the building and premises were occupied by J. G. Wilson, but the defendant denied that he made said purchase agreeing to take the risk of obtaining the unexpired right and possession of the premises from Wilson. And he further expressly denied that, very soon after the making of said agreement, or at any time, the defendant made arrangements with Wilson by which he was let into full possession of said building or premises, as alleged in the complaint. And the defendant alleged that he never, at any time, had any possession whatever of the

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said building or premises. That soon, and within a day or two after the making of the said agreement, the defendant called upon Wilson, and requested him to surrender and give up possession of the said building and premises to this defendant, which Wilson refused to do, claiming that he was under no obligation to leave, and could not be compelled to leave the same under six months.

That within about four or five days after the making of said agreement and while Wilson was still in possession of the said building and premises, and refusing to give up the same, as aforesaid, the building accidentally took fire and was burned up, by which said agreement was rendered utterly worthless to the defendant, he not being able up to that time to get any possession or use of the said building or premises, they being utterly valueless and useless to the defendant for such unexpired term without such building. The said defendant admitted that, after the making of said agreement and on or about the 18th of August, 1862, the plaintiffs tendered to him papers purporting to be substantially a release of their interest in said building and premises, and an assignment of the unexpired term of a lease by which they claimed to hold said premises, and demanded of the defendant payment of the said \$200, which he refused to pay, and refused to accept said release or assignment on the ground that he had not been able to obtain possession of said premises or building as aforesaid. And the defendant further answering, alleged that before the burning of said building he duly notified the plaintiffs of the refusal of said Wilson to give possession of said premises, as hereinbefore stated; but they neglected to give the defendant such possession, and took no steps to compel the said Wilson to give possession.

On the trial, the jury, under the direction of the court, found a verdict for the plaintiff for \$310.69.

*Spencer Gooding*, for the appellant.

*E. G. Lapham*, for the respondent.

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*By the Court, E. DARWIN SMITH, J.* By the contract between the parties of the date of June 3d, 1862, the plaintiffs agreed to sell, and the defendant to purchase all the right of the plaintiffs in the premises therein described, for the consideration of \$200. The plaintiffs had a leasehold interest in the premises, subject to a rent of \$70 per annum, which term would expire on the first of March thereafter, with the privilege of a renewal for two years longer, from the said first of March. The building on the premises was erected by the plaintiffs, but it does not appear that they had any right to remove it from the demised premises at the end of the term. It was, therefore, a fixture attached to the freehold, and was part of the realty. The agreement between the parties was, therefore, a contract for the sale of an interest in land. The defendant was authorized to take immediate possession. The payment of the consideration was to be made upon demand, as no time was fixed for its payment. Strictly, perhaps, the plaintiffs could not have required payment till they tendered an assignment of the lease, and gave the defendant possession. The contract, however, was absolute, and vested in the defendant the equitable interest in the land the moment it was executed and delivered. (*Moore v. Burrows, and Adams v. Green*, 34 Barb. 173 and 183.) This action is for the \$200 consideration money specified in the contract, and the plaintiffs showed at the trial that they had tendered an assignment of their lease of the premises and also a quit claim deed thereof in execution of the contract, and demanded payment. The defendant showed nothing in the shape of a defense to the action, at the trial. It is true, he did not get possession, and could not for several days after the execution of the contract; but that did not avoid the contract. He purchased the plaintiffs' interest in the land as it was at the time, and was content to take the contract with a provision authorizing him to take immediate possession. This was not a covenant for the immediate possession, or a condition therefor, the breach of which avoided the contract.

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The destruction of the building by fire, after the making of this contract, was no defense in the action. In *Sugden on Vendors*, p. 254, it is said, "that a vendee being the equitable owner of the estate from the time of the contract of sale, must pay the consideration for it, although the estate itself be destroyed between the agreement and the conveyance; and on the other hand, he will be entitled to any benefit which may accrue to the estate in the interim," and cites 2 *Powell on Contracts*, 61; *Paine v. Meller*, (6 *Vesey Jr.* 349;) *Poolè v. Sheyold*, (2 *Bro. C. C.* 118;) *Real v. Hussey*, (2 *Ball & Beatty*, 280;) and *Harford v. Pumes*, (1 *Madd.* 532.) Vide also *Fry on Specific Performance*, § 600, and *Story's Eq.* §§ 101, 102. In *Paine v. Miller*, *supra*, Lord Eldon said of the vendee in such cases: "If the party, by the contract, has become in equity the owner of the premises, they are his to all intents and purposes. They are vendible as his, chargeable as his, capable of being encumbered as his; they may be devised as his; they may be assets, and they would descend to his heirs." Another consideration in support of this view, is that the vendee has an insurable interest in the premises after the contract of sale, and might have protected himself by an insurance; and if the vendor retaining the title for his security has also a policy of insurance on the buildings on the premises, such policy would be merely a collateral security, and in case the building was destroyed by fire, the insurance company paying the loss would be entitled to an assignment of the debt, and to be subrogated to his rights. (*Angell on Fire Insurance*, § 66. *McGivney v. Phenix Fire Insurance Company*, 1 *Wend.* 85. *Etna Fire Insurance Company v. Tyler*, 16 *id.* 385.) If this contract had been a lease of this building, then this consequence would not follow. The landlord would be bound to give possession before the estate would vest, or term commence, and until that was done the lease would be a mere executory contract, as was held by this court in *Wood v. Hubbell*, (5 *Barb.* 604;) or if it had been a sale of personal

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 Gilmore v. Jacobs.
 

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property, the plaintiff would be bound to make delivery before the title would vest, and in the meantime the property would be at his risk. (2 *Kent's Com.* 2d ed. 367. 9 *Dowl. & Ry.* 276. 7 *East*, 558, and 11 *id.* 210. *Thompson v. Gould*, 20 *Pick.* 139.) I do not see why the motion for a new trial must not be denied, and judgment be ordered upon the verdict.

New trial denied.

[MONROE GENERAL TERM, March 4, 1867. *Waller, E. D. Smith* and *Johnson*, Justices.]

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### JOHN GILMORE vs. ELIZA JACOBS, impleaded, &c.

The general power of amendment, given to courts of record in sections 172 and 178 of the Code, does not belong to justices' courts; nor do any of the general provisions in relation to the amendment of process and pleadings, contained in other parts of the Code and in the Revised Statutes, apply to justice's courts.

Where the summons, in a justice's court, is sued out and served upon two defendants, the name of one of them cannot be dropped, in the subsequent proceedings, without leave of the court. But if the justice permits the plaintiff to declare against one of two joint defendants, only, he will be deemed to have allowed an amendment of the summons, for that purpose, if he had any power to do so.

A justice of the peace has no power to grant an amendment allowing the plaintiff to strike out the name of a defendant from the summons, after service thereof, and to proceed to trial and judgment against the other defendant, alone.

THIS is an appeal from a judgment of the Cayuga county court affirming the judgment of a justice's court. The action was brought before a justice of the peace, against two defendants, viz. *Roswell B. Jacobs* and *Eliza Jacobs*. At the joining of issue, the plaintiff, in his complaint, stated that he asked leave to withdraw the name of the defendant *Roswell B. Jacobs*, and proceed against the defendant *Eliza Jacobs*. The court made no ruling striking out the name of

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said defendant, or allowing the plaintiff to withdraw the same. On the adjourned day, and before any evidence had been given on the trial, the defendant, Eliza Jacobs, raised the objection that it was unlawful for the plaintiff to withdraw the name of one defendant, as he asked to do in his complaint, and proceed against the other defendant. The court overruled the objection, and proceeded to trial and judgment against Eliza Jacobs alone. Judgment was rendered by the justice, in favor of the plaintiff, against the defendant Eliza Jacobs, for \$16.34, damages and costs. On appeal to the county court, the judgment was affirmed.

*H. V. Howland*, for the appellant.

*Geo. Rathbun*, for the respondent.

*By the Court*, E. DARWIN SMITH, J. The defendant had a separate estate, and her husband was without means or credit, and there is considerable evidence and, I think, a decided balance in the weight of testimony tending to show that she contracted the debt for the wood in question, and that the same was sold to her, and on the credit of her separate estate; and the jury having in effect so found by their verdict, it cannot be disturbed on the ground that it was unwarranted by the evidence. On the merits, the verdict, I think, is clearly right. The only question in respect to the correctness of the judgment is whether the plaintiff was entitled to declare at the trial against Mr. Jacobs alone; the summons for the commencement of the action having been sued out against and served upon her and her husband Russell Jacobs. The justice does not appear to have made any formal decision upon the question of allowing the plaintiff to proceed against one defendant alone, but I think he must be deemed to have allowed an amendment of the summons for that purpose, if he had any powers to do so, because he did allow the plaintiff to declare

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against Mrs. Jacobs singly, notwithstanding the objection of misjoinder with her husband was made at the time, and afterwards at the trial, and proceeded to try the cause as though she were sued alone as a single defendant, and rendered judgment against her as a sole defendant. A justice's court being a court of special and limited jurisdiction, has no powers except those expressly conferred upon it by statute.

The general power of amendment given to courts of record in §§ 172 and 173 of the Code, does not belong to justices' courts, nor do any of the general provisions in relation to the amendment of process and pleadings, contained in other parts of the Code and in the Revised Statutes, apply to justices' courts. (*Webster v. Hopkins*, 11 *How. Pr. R.* 140. *Perkins v. Richmond*, 17 *id.* 312. *Gates v. Ward*, 17 *Barb.* 424.) In this court a plaintiff could not amend his summons, so as to leave out the name of one of the defendants, before the Code, and cannot now, without leave of the court. (*Russ v. Spear*, 3 *Code Rep.* 189. 1 *Code Rep.* 157 *N. S. and Dibble v. Mason*, 1 *id.* 37.) The name of Jacobs could not therefore be dropped in the proceedings before the justice without leave of the court, and as it was done, leave must be considered as granted. The question is, then, had the justice any power to grant such an amendment? I cannot find that the justice has any such power. It is not expressly given to justices of the peace, in any provisions of the justices' act, and therefore justices' courts cannot possess or exercise any such power. The case of *Gates v. Ward*, and *Webster v. Hopkins*, deny such right. These are both general term decisions of this court, and we feel bound to follow them. We must therefore hold that the justice had no right to strike out the name of Russell Jacobs from the summons and sever in the action after summons served upon both the defendants; and the judgment for this reason should be reversed.

[MONROE GENERAL TERM, March 4, 1867. *Wells, E. Darwin Smith and Johnson*, Justices.]

BLISS *vs.* SCHAUB.

The Supreme Court, on appeal, can review a judgment of a county court rendered on appeal from a justice's court, on exceptions that are made a part of the record, though the exceptions have been passed upon in the county court, on a motion made in that court for a new trial.

One digging a hole in a public street, and leaving the same open and unprotected or unguarded, is liable for injuries to others, arising from his negligence. A person in the possession of, and using, property as a bailee for hire, may recover damages for an injury thereto.

**A**PPEAL from a judgment entered on the verdict of a jury, on the trial of an issue of fact, in the Wayne county court. The case came into the county court on appeal from a justice's court, where the plaintiff recovered a judgment for \$160, damages and costs. The plaintiff alleged, in his complaint, that on or about the 24th of June, 1865, the defendant caused to be excavated and opened in and through a public street in the village of Clyde, known by the name of Ford street, in and upon which the people and public are used and accustomed to travel and may of right lawfully travel with teams and carriages, a deep excavation or hole about twenty feet long, twelve feet wide and fifteen feet deep; and negligently and carelessly left and permitted the said deep excavation to be and remain open and unguarded in said street, and negligently and carelessly neglected to put or keep any guard, barrier or protection of any kind around or over said deep excavation to prevent travelers' horses and carriages from falling therein. That on or about the day and year above mentioned, and while said excavation was so negligently and carelessly allowed to remain open and unguarded as aforesaid, and whilst the plaintiff's wife and servant was driving his (the plaintiff's) horses and wagon in and along said street near said excavation, the said horses and wagon accidentally and unavoidably, and without fault or negligence on the part of the plaintiff, backed and fell into said excavation, and thereby the said horses were greatly bruised, maimed and injured; and the said wagon broken

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Bliss v. Schaub.

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and damaged; wherefore the plaintiff demanded judgment against the defendant for the injury and damage aforesaid, to the amount of \$200.

The defendant in his answer denied the allegations of the complaint, and alleged that the plaintiff was guilty of carelessness and negligence on his part in the management and control of his team on the occasion mentioned in the complaint, which prevented his recovery. He further alleged that on or about the 24th day of July, 1865, he, the defendant, was in the employ of the state of New York, and as such employee of the state was engaged in and about the work described in the complaint, and prosecuted it under the direction and control of the state, and all that was done or left undone upon said work, was strictly in compliance with his (the defendant's) directions received from his employers, the state of New York, through the board of canal commissioners of said state, whereupon he claimed judgment for his costs and disbursements.

On the trial in the county court, the plaintiff, by his counsel, in opening the case to the jury, claimed as follows: for damage done to a span of horses, wagon and harness, by getting into a ditch on what is called Ford street, in the village of Clyde, which the defendant was digging for the state. The defendant commenced the work in 1864, and worked it through to Ford street. In the spring of 1865, it was found that the ditch had been stopped up; the defendant dug a hole to clean out the obstructions, and left it open for some time, and David S. Gordon drove the plaintiff's team to Clyde, and drove them in between Mr. Stevens' malt house and a brewery, for the purpose of watering them, which was on the south side of Ford street, and nearly opposite the hole made by the defendant. After Gordon had driven the team in there, he got out of the wagon, leaving the lines in the wagon, and left the team without tying, and went to get some water for them, and while after the water, the team

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commenced backing, and backed into the hole. Gordon saw the team backing up, and ran and caught the near horse by the bits, and tried to stop them, but was unable to do so. It was the duty of the defendant to have kept the hole protected.

Upon which said opening and statement to the jury, the defendant moved for a nonsuit or dismissal of the complaint, upon the ground that the plaintiff, in his opening, had failed to state a cause of action against the defendant, for the reason that the plaintiff had shown himself guilty of negligence; and, therefore, could not recover; which said motion was denied, and exception taken by the defendant. Testimony was then given on the part of the plaintiff, when the plaintiff rested.

The defendant moved for a nonsuit, on the ground that the plaintiff had failed to make out a cause of action, and that it should appear affirmatively, on the part of the plaintiff, that he was not guilty of negligence, and upon the further ground that it appeared from the plaintiff's own showing that he was guilty of negligence, and hence was not entitled to recover. The motion was denied.

The defendant asked the court to charge the jury that if they found that the defendant was doing the work for the state, as agent or contractor, he was not liable and the plaintiff could not recover. The court declined so to charge and the defendant excepted. The cause being submitted to the jury, they found a verdict in favor of the plaintiff for \$151.50, and upon said verdict a judgment was rendered herein on the 5th day of April, 1866, in Wayne county clerk's office, in favor of the plaintiff, for \$208.41, damages and costs; from which judgment the defendant appealed to this court.

*Lyon & Norton*, for the appellant.

*O. D. Lawton*, for the respondent.

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*By the Court*, E. DARWIN SMITH, J. It is objected by the respondent, preliminarily, that it does not appear from the printed case that a motion for a new trial on the exceptions had been made in the county court, and that the appeal should therefore be dismissed. This objection is based upon the decision in the case of *Simmons v. Sherman*, (30 *How. Pr.* 4,) which coincides with a decision to the same effect in *Carter v. Werner*, (27 *How. Pr.* 385,) in which it is held that no appeal to this court upon a case or exceptions made on a trial in the county court upon appeal from a justice's court should be entertained until the county court has passed upon the questions presented by such case or exceptions, upon a motion for a new trial made thereon in that court. In conflict with these cases—both general term decisions—the former in the third and the latter in the fifth district, the court in the sixth district, in *Monroe v. Monroe*, (27 *How. Pr.* 208,) in *Whitney v. Wells*, (28 *id.* 150,) and in *Boughton v. Mitchell*, (29 *id.* 68,) have held that this court, upon appeal from a judgment of the county court, can review the errors brought up by the record, including those contained in a case or exceptions. The same question was passed upon in this court in the case of *Dixon v. Buck*, (42 *Barb.* 72,) in which my brethren held, in accordance with the cases in the sixth district. We must therefore adhere, of course, to our own decision on the point; but if the question were a new and an open one, I should greatly prefer to follow the rule or construction of the statute adopted in the cases of *Simmons v. Sherman*, and *Carter v. Werner*, among others, for these two reasons: 1st, because such rule would probably, in a great variety of cases, obviate the necessity of reviewing the case at all in this court. 2d, because it is most fair and expedient to allow the county judge who has tried the cause the same opportunity to correct the errors he may have made in the haste and pressure of a trial that is possessed by the judges of this court. I have no doubt that the county judges would in a large proportion of the cases thus presented to them review their own decisions

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with care and circumspection, and correct their errors with readiness and sound judgment. In this court it is found in practice that the judges constantly review with freedom and fairness, and are pleased to correct, their own decisions at the circuit, and I have no doubt it would be so in a large degree with the county judges; and I should, therefore, greatly prefer that the rule governing the decisions of the county judges on the trial of causes in that court be restricted to a review of the deliberate decisions of the county court after argument and time given for deliberation and discussion.

Upon the merits of the case I think no error occurred on the trial, or none of any consequence. The case was fairly submitted to the jury, upon the question of the plaintiff's and defendant's negligence, and this court cannot upon any sound principle, in view of the present state of opinion in the Court of Appeals upon this class of questions, interfere with the verdict of the jury, upon this question. The defendant was liable for the negligence of digging the hole in the street and leaving the same open and unprotected or unguarded, within the cases of *Blake v. Ferris*, (5 N. Y. Rep. 48,) *Pack v. The Mayor, &c.* (8 id. 222,) *Kelly v. The Mayor, &c.* (11 id. 432,) and *The City of Buffalo v. Holloway*, (7 id. 493,) and the plaintiff having hired the wagon injured, and being in the possession of and using it, was entitled, as a bailee thereof, to recover damages for the injury thereto. (*Edw. on Bailments*, 142. *Story on Bailments*, 93. *Faulkner v. Brown*, 13 Wend. 63.)

The question put to the witness Gordon, whether he had watered horses and seen others water horses at the place in question, was not improper. It was directed to the question of his negligence, which was a question to be affected by the practice and custom of watering horses at that place. The question how much less the horse was worth by reason of the injury, was not improper. It was a question of opinion in respect to the value of the horse before and after the injury,

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and was one of that class of questions constantly asked and allowed, on the subject of damages. The same reasons apply to the question, how much the harness was injured.

I think the judgment should be affirmed.

Judgment affirmed.

[MONROE GENERAL TERM, March 4, 1867. *Wells, E. D. Smith and Johnson, Justices.*]

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THE AUBURN EXCHANGE BANK *vs.* MORELL S. FITCH  
and others.

A man confessedly in embarrassed circumstances, and, as the result shows, insolvent, seeing that a firm of which he is a member must probably fail, may lawfully appropriate his private property to the payment primarily of his private debts, in preference to the partnership debts, by conveying and transferring such property to his private creditors, in payment of their just demands; and such conveyances and transfers will be valid; where there is nothing to impeach the good faith of the grantees, or tending to show that they were privy to any concealment or fraudulent intent or purpose on the part of the grantor, in disposing of his property.

An individual may, at all times, convey or turn out his property in payment of his just debts; and this is none the less true because he is straightened in his circumstances, and unable to pay all his creditors. At such times he may honestly prefer one creditor to another; and if he sells and conveys his property for a fair price, in payment of just debts, the legality of the conveyances or transfers cannot be questioned. Fraud cannot be predicated upon such a transaction, on the assumption that the debtor meant to defraud his creditors.

An intent on the part of the grantees to defraud, or to concur in, or aid in carrying out or consummating any fraud on the part of the grantor, cannot be imputed or inferred from the fact that such grantees did in fact receive transfers of all the property of the grantor, and must have known that his other creditors could not be paid.

The law is not so unjust as to forbid a son from paying an honest debt to his mother, by a conveyance to her of his family residence; nor is it so unreasonable as to require her to turn her son into the street, at the peril of losing the estate. *Per E. D. SMITH, J.*

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THE action was brought to set aside several deeds of conveyance of real estate, by the defendants, Morrell S. Fitch, and Laura his wife, to the defendant Mrs. Masters ; a chattel mortgage by the said Morrell S. Fitch, to the said Elorsey S. Masters ; a transfer of stock in the Auburn Gas Company, by the said Morrell S. Fitch to his wife, and a subsequent transfer thereof by her to the defendant James C. Reed ; and transfers to either of the other defendants ; and a general assignment by Curtis Hemingway, a defendant, and the said Morrell S. Fitch, to Elmore P. Ross, for the benefit of creditors, on the ground that said conveyances, &c. were made to defraud creditors ; and for other relief. The plaintiff was a judgment creditor of Hemingway & Fitch. On and previous to the 8th day of April, 1864, Fitch & Hemingway were partners, and on that day they were insolvent, both jointly and severally. On that day Fitch conveyed all his real estate to his mother, Elorsey S. Masters, and on the same day he executed a chattel mortgage to her upon all his fangible personal property. These deeds were not recorded, nor was the chattel mortgage filed until September 19, 1864. Fitch also at or about the same time transferred his stock and other evidences of debt, mostly to his mother, but a part to his wife, who soon after sold to James C. Reed ; having thus disposed of the title to all his property, both real and personal, but still continuing in possession. Fitch united with Hemingway, on the 17th of September, 1864, in making an assignment of all their property *both joint and several* to Elmore P. Ross, who accepted the trust and took possession of all the property included in the schedule annexed to the assignment. This assignment was in fact not only made with the knowledge of the plaintiff, but its provisions were dictated by its president. After the assignment was made, and before this action was commenced, the assignee commenced an action to set aside these same conveyances and transfers. Why the action by the assignee was not prosecuted does not appear.

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The making of the assignment is set out in the complaint in the present action, wherein it is alleged as follows: "And the said plaintiff further says, that although more than two months have elapsed since the execution and delivery of said assignment, no property, nor evidence of property whatever of the individual property of said assignors, has passed to the possession or control of said assignee, named in said general assignment. Nor, with the exception of a safe, and some office furniture of trifling value, has said assignee received into his possession, or under his control, any property, or evidence of property from the assets of said firm. And the said plaintiff further says, upon information and belief, that said instrument of assignment was prepared by the said Pingree, and executed and delivered by the said Hemingway & Fitch, not with the honest purpose of distribution through said assignee, of the proceeds of their joint and individual property in the payment of their debts, according to the priorities established in said assignment, but as the closing act of a contrived conspiracy on the part of said Hemingway, Fitch and Pingree, of which the acts and circumstances hereinbefore stated, are parts, to defraud the creditors of said assignors, and to hinder and delay them in the collection of their just debts." The prayer in relation to the assignment is as follows: That "the said instrument of assignment or deed of trust so executed by the defendants, Curtis Hemingway and Morell S. Fitch, to the defendant Elmore P. Ross, may be declared to be fraudulent and void as against the plaintiff in this action, and may be set aside and vacated as such," &c.

Proofs were taken, but no proofs tending to show that Fitch & Hemingway or either of them had any property of which the assignee could have taken possession, or in any wise obtained, except through the action of this court. The defendant Ross, (the assignee,) answered, claiming all the property (if any) which had been fraudulently disposed of by his assignor Fitch.

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The cause was tried before Justice JAMES C. SMITH, at special term. He found that the conveyances of the real estate, and the transfer of his personal property by Fitch, were made to hinder, delay and defraud his creditors. The court then declares as matter of law "that said assignment \* \* \* is valid, and said Ross as assignee, is entitled by virtue of its provisions, to all the property of said Hemingway & Fitch, or either of them, (including that covered by said transfers and conveyances,) herein declared void (excepting the stock purchased by said Reed of Mrs. Fitch) and including also the avails of said stocks received by Mrs. Fitch for the purpose of the trust expressed in said assignment; and a judgment may be entered, directing said Curtis Hemingway, Morell S. Fitch, Elorsey S. Masters, Laura Fitch and John T. Pingree, and each of them to deliver to said Ross as such assignee, all property in their hands, respectively covered by said transfers, or either of them, and the proceeds and avails thereof in their hands, and perpetually restraining them, their attorneys and agents, from making any other disposition thereof." Appeals were taken by the following parties: (1.) By Morell S. Fitch and Laura Fitch his wife; (2.) By Elorsey S. Masters and John T. Pingree; (3.) By the plaintiff the Auburn Exchange Bank.

*D. Pratt*, for the plaintiff.

*T. R. Strong, Geo. Rathbun and D. Wright*, for the defendants.

*By the Court*, E. DARWIN SMITH, J. The judgment rendered at special term, adjudging that the several conveyances and transfers therein mentioned from the defendant Morell S. Fitch to the defendants Elorsey S. Masters, Laura Fitch and John P. Pingree, including the chattel mortgage also therein mentioned, were fraudulent and void, and directing that the same be set aside, vacated and annulled, was based

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upon an express finding of fact in which the learned judge finds "that the said several conveyances and transfers were executed by the said Fitch with intent to hinder, delay and defraud the creditors of the firm of Hemingway & Fitch, (of which the said Fitch was a member,) in the collection of their debts, and were accepted by the said Elorsey S. Masters, Laura Fitch and John P. Pingree, with the like intent."

The legal conclusion drawn by the learned judge from the facts he found was clearly correct, and we are therefore called upon to examine the evidence in the case and see if the said findings upon the facts, as contained in the decision at special term, were authorized or warranted by such evidence.

The several conveyances and transfers thus set aside by the judgment, at special term, were all professedly made in consideration and satisfaction of debts claimed to be justly due and owing to the said respective grantees or vendees of the property, from the said Morell S. Fitch.

In the decision at special term nothing is said about these debts, but in the opinion of the learned judge he says that he had not thought it necessary to decide whether the claim of Mrs. Masters was an honest and valid debt for its full amount, at the time of the transfer. He thought it probable that she had a valid debt originally, but that there was much evidence tending to show that a large portion of it had been paid.

If the learned judge had considered the evidence relating to the validity and justness of these several debts in payment of which the property in question was conveyed or transferred to the several grantees or vendees thereof, and had found, as a matter of fact, that such debts in whole or in part, or any or either of them, were fictitious or trumped up for the occasion, his finding that the said transfers to pay such debts were fraudulent would have been well founded and most incontestible.

But in the absence of any such finding, and upon the concession or assumption that said debts are valid and justly

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due and owing to the several parties as claimed and asserted by them, very different rules and principles apply in the review of the question of fraud asserted in such decision. Upon the facts, as they appear in evidence, it seems to me that the debts to Mrs. Masters, to Mrs. Fitch and to Pingree, and to each and every one of them, are clearly established to be honest, just and valid for the full amount thereof, respectively claimed by them. The proof is clear and explicit on this subject, and I do not think it could be found or held otherwise with any degree of fairness.

The existence and validity of the debt of Mrs. Masters is fully proved by herself, by her husband and by Fitch, and there is no evidence in the case to impeach their testimony on this subject, or their credit as witnesses. The debt of Mrs. Fitch is also conclusively proved to have been hers, and to have arisen from her separate property; and the debt of Pingree for professional services and expenses clearly exceeded the securities received by him from Fitch.

Assuming that the said deeds and transfers to Mrs. Masters, Mrs. Fitch and to Pingree were thus given for honest and valid debts, they may nevertheless be held fraudulent and void, and the question of fraud is one of fact; but as, in this view, they are deeds to purchasers for a valuable consideration, the statute declares that they shall not be affected or impaired for any fraud of the grantor or vendor, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantee. (2 *R. S.* p. 137, § 5, *title 3, ch. 8.* 21 *N. Y. Rep.* 168. 17 *id.* 28.)

We see, then, that the import of the finding at special term is that these deeds and transfers were made to hinder and defraud creditors, and that the grantees were privy to such fraud. In this view of the force and effect of the findings upon the facts at special term, that these deeds and transfers were made and executed with intent to hinder, delay and defraud the creditors of the firm of Hemingway &

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Fitch, I think it cannot be sustained, and is not warranted by the evidence.

Morell S. Fitch, at the time of making these conveyances and transfers, was confessedly in embarrassed circumstances, and, as the result shows, clearly insolvent. He owned and had in his possession a large amount of property. The firm of Hemingway & Fitch was greatly extended, and in desperate circumstances, and it was through the losses and embarrassments of this firm that Fitch was straightened, and not from any difficulty in his private affairs. Seeing that the firm of Hemingway & Fitch must probably fail, Fitch, early in the spring of 1862, evidently began to prepare for that event, and determined, it seems, to appropriate his private property to the payment, primarily, of his private debts in preference to the partnership debts. With this view and intent, he made the conveyances and transfers in question, conveying his property to his private creditors in payment of these honest debts. He made and delivered the deeds and transfers on the 8th of April, 1862, and apparently remained in possession of the real estate and household furniture for several months afterwards. It appears that the firm of Hemingway & Fitch floundered along during these several months, when they finally failed, and that during this period Fitch had more or less the hope and expectation that the firm would recover from its embarrassments and sustain itself and go on, and spoke of it and of his own affairs, on some occasions, as though he was the owner of all his private property. So far as Fitch is himself concerned, these facts present about all there is in the case tending to show that he had any fraudulent purpose in disposing of the property. But so far as relates to the grantees in these several conveyances and transfers, there is nothing to impeach their good faith; really nothing, fairly considered, tending to show that they were privy to any concealment or fraudulent intent or purpose on the part of Fitch in disposing of his property.

The deeds to Mrs. Masters were executed and delivered on

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the 8th of April, and she testified that she then put them in her safe, and that they remained there till about the first or second of September afterwards, without any design or concert for that purpose, but by mere heedlessness and accident. She let her son remain in her house because he was her son, and had nowhere else to live. She had a perfect right so to do. The law is not so unjust as to forbid a son from paying an honest debt to his mother by a conveyance to her of his family residence; nor is it so unreasonable as to require her to turn him into the street, at the peril of losing the estate. In respect to the gas and telegraph stock transferred to Mrs. Fitch, it appears that the gas stock was purchased with her money, and that she always had the scrip, although it was issued, when first purchased, in the name of Fitch, that he might be a director in the company. Mrs. Fitch had the possession of this scrip before its transfer to her on the books, on the 8th of April, and the new scrip issued in her name was immediately delivered to her, and the telegraph stock was transferred at the same time, and the scrip issued to her. The property transferred to Pingree was choses in action, and was immediately delivered to him, and kept by him as his own. Possession of all the property transferred by Fitch was immediately delivered, and a continued change of possession thereof followed, except in respect to the real estate conveyed to Mrs. Masters, and the property conveyed by the chattel mortgage. The personal property embraced in the chattel mortgage stands upon a somewhat different footing from the other property. Possession not having been taken under it immediately by the mortgagee and continued, the law presumes it fraudulent; and it may be that the creditors might hold this property. The legal presumption against its validity is some evidence on that point, and if it stood alone, and was unconnected with the other property, the finding of fact distinctly declaring it fraudulent, perhaps, could not be disturbed.

Aside from these facts relating to possession of the property,

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there is, it seems to me, really no evidence in the case tending to prove that Mrs. Masters, Mrs. Fitch and Pingree, received the conveyances and transfers by them respectively, with any intent to defraud, or with any knowledge or notice that the said Morell S. Fitch had executed said conveyances and transfers with intent to defraud his creditors.

They all deny such knowledge or intent. Mrs. Masters, Mrs. Fitch and Pingree, respectively expressly deny that they had any notice or knowledge of any intent on the part of Fitch to defraud his creditors, and he denies also that he had any such intent. Mrs. Masters testifies that "she did not know or think that Morell was going to make an assignment, or was unable to pay his debts." Masters, the husband of the defendant Mrs. Masters, who took the deeds and transacted the business for his wife, with Fitch, testifies that when he was making the deeds he did not know but that he (Fitch) could pay every debt he owed, and more too. He had no suspicions that any thing was wrong. He says, "I handed the deeds to my wife, and she put them in her safe. My wife spoke to me once or twice about having them recorded, but it was neglected by carelessness." So far as particular intent on the part of the grantees in these deeds and transfers to defraud, or to concur in, or aid in carrying out or consummating any fraud on the part of Fitch in making these conveyances, is concerned, I think it is completely and entirely disproved, except so far as such intent may be imputed or inferred from the fact that these several grantees did in fact receive transfers of all the private property of Fitch, and must have known that his other creditors could not be paid. They must all have known, his mother, perhaps, least of all, that he was straightened and embarrassed in his circumstances, and feared that he would be unable to extricate his affairs, and go on with his business. His offer to convey and transfer his property in payment of his private debts implied this, and was of itself notice of his embarrassments. A man does not ordina-

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rily propose to transfer all his property to his creditors without some apparent occasion or necessity.

But nothing is clearer than that a man may at all times convey or turn out his property in payment of his just debts ; and this is none the less true, because he is straightened in his circumstances, and unable to pay all his creditors. At such times he may honestly prefer one creditor to another, and if he sells and conveys his property for a fair price in payment of just debts, no one can question the legality of the conveyance or transfer. There is, there can be, no fraud in such a transaction. Fraud cannot be predicated upon it, on the assumption that the debtor meant to defraud his creditors. There is no fraud in the case, if the property in fact goes to pay and satisfy an honest debt. A creditor in such case will ordinarily be anxious to get his pay when his debtor's circumstances are most desperate, and his anxiety and efforts for that purpose will naturally be in proportion to the desperation of the affairs of his debtors and the danger there is of the entire loss of his debt.

I know it is said in some of the cases, and is said in the opinion of the learned judge at special term, that a transfer may be fraudulent though made to pay an honest debt, and *Twyne's case*, (3 Coke R. 80,) *Waterbury v. Sturtevant*, (18 Wend. 353,) and *Hanford v. Artcher*, (4 Hill, 271,) are cited in support of this doctrine.

In *Twyne's case*, Twyne took a conveyance of all his debtor's goods, without exception, and left them in possession of the vendor, who continued to use, sell and manage them as his own. It was a case of personal property clearly sought to be covered up by a sham sale. The case of *Hanford v. Artcher*, was also a case of personal property, and the question arose under our statute in regard to the sale of personal property, the vendor remaining in possession. The case of *Waterbury v. Sturtevant*, was the case of a sale of land in payment of a debt, and the court for the correction of errors

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reversed the chancellor's decree, and held the payment good and the deed valid.

The proposition, nevertheless, is in a certain sense true that a man having an honest debt may so use it to aid his debtor in a dishonest scheme of covering up and concealing his property as to render a conveyance to him in apparent payment of such debt fraudulent. But it must be when it is used as a mere cover or instrument of deception, and with intent to keep much more property than the creditors get by the conveyance, or much more in value than his debt from the other creditors. But I deny the proposition that a conveyance by a debtor to his creditor in payment of an honest debt at a fair price, can be impeached for fraud, because some other creditor will lose his debt. It is a perfect absurdity to say that a conveyance of property which pays one's creditor, and nothing more, and pays him a just debt, can be fraudulent as against other creditors of the common debtor.

If a man purchase property of a debtor to aid him to get it into money or choses in action, thereby more easily to hinder and delay or defraud creditors, or take a mortgage on a large amount of property, with the view and design to cover it up so as to hinder the creditors of the mortgagor, such conveyance may doubtless be avoided for fraud.

This is the precise case stated by Senator Edwards, in *Waterbury v. Sturtevant*, (*supra*, 364.) In stating the rules in such cases, he said, "I admit that if the property is sold for the purpose of preventing or delaying the collection of a debt, and the purchaser, knowing the facts, makes the purchase for the purpose of aiding that intent, the sale is fraudulent, although a fair consideration is paid." This is not the case of a conveyance made and received in payment of an honest debt. In the race of creditors to get payment of their respective debts from their common debtor, who cannot pay all, each creditor will and may look out primarily for himself, and if he gets or takes no more than a fair and reasonable amount of his debtor's property, and takes and receives it in payment

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Hicksville and Cold Spring Branch R. R. Co. *v.* Long Island R. R. Co.

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and satisfaction of his debt, his title thereto cannot be impeached. He is not obliged to look out for other creditors, or to consider whether they will or will not get their debts. There can be no fraud in his getting his own debt, if he takes no more than the pound of flesh, whatever may happen to other creditors of the common debtor.

In this case, I think it clearly appears that the property conveyed by Fitch to Mrs. Masters, Mrs. Fitch and Pingree, was transferred in payment of honest debts, and at nothing more than a fair price, and I do not see how those transfers can be impeached. At least, I think the judgment setting them aside erroneous, and that the same should be reversed.

As this view of the case necessarily involves a new trial, I do not think it necessary or expedient to discuss any other questions in the case.

The judgment should be reversed, and a new trial should therefore be granted, with costs to abide the event.

[MONROE GENERAL TERM, March 4, 1867. *Wells, E. D. Smith and Johnson, Justices.*]

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## THE HICKSVILLE AND COLD SPRING BRANCH RAILROAD COMPANY *vs.* THE LONG ISLAND RAILROAD COMPANY.

### THE LONG ISLAND RAILROAD COMPANY *vs.* THE HICKSVILLE AND COLD SPRING BRANCH RAILROAD COMPANY.

A counter-claim, or defense of an equitable nature, may be interposed although the claim or demand mentioned in the complaint is purely of a common law nature, or for the recovery of money only.

If the claim and counter-claim arose out of the same transaction or contract, there is no necessity for a cross action by the defendant.

The plaintiff sued to recover six months rent of its branch railroad, under a written lease thereof to the defendant, and the defendant set up as a counter-claim, an extinguishment of the right to recover rent, arising from a tender of the purchase price of the branch road, under an option or privilege contained in the lease, before the rent accrued, &c. The lease was of the

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Hicksville and Cold Spring Branch R. R. Co. v. Long Island R. R. Co.

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branch railroad, the land upon which the same was built, embracing the titles, &c. and generally the property "*as it now exists*," (at the date of the lease,) the cost of which was \$45,804. The right to purchase was of the *demised premises*, upon payment of the said cost thereof, and all rent computed to the time of purchase; and upon payment, the said *demised premises* were to be conveyed, free from incumbrance. When the tender was made, the defendant required the plaintiff to convey to the former company a *perfect title*, or to convey *with covenant of warranty* as to the title.

*Held* that the defendant, when making such tender, required more than its contract permitted; and the tender was therefore no bar to the claim for rent, and did not prevent its accruing in future.

*Held, also*, that the plaintiff not having demanded, but on the contrary, having resisted, a specific performance in the manner claimed by the defendant; and the defendant having sought to compel the plaintiff to complete its title, at an additional expense, by the tender of the cost, only, of the demised premises, as they existed at the date of the lease, neither party was in a condition to demand a specific performance, in respect to a conveyance of the premises.

*Held further*, that the facts did not warrant a decree compelling the defendant to pay \$45,804, as upon an option or privilege of which it had never sought to avail itself.

A claim made for relief, or for a deed, upon terms to which a party is not entitled, does not subject him compulsorily to accept a deed upon some other terms.

In such a case the relief demanded should be denied, simply with or without costs, according to the regulated discretion in equity cases.

**A**PPEAL by the Long Island Railroad Company from judgments entered in the above actions, at special term. The actions were tried together. By an agreement, dated the 22d of November, 1853, the Hicksville and Cold Spring Branch Railroad Company agreed with the Long Island Railroad Company "to cause its road to be built" from Hicksville to the neighborhood of Philetus Ketcham's, at Syosset; and that "after being finished" to that point, the branch road should be operated and used solely by the Long Island Railroad Company, the latter paying to the Branch Company for such use at the rate of seven per cent per annum on the cost, and the taxes. This agreement contained further provisions for extending the branch from Syosset to Cold Spring, and operating the same when thus extended, and

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giving the Long Island Railroad Company the right to purchase the branch road at cost, at any time. Prior to March, 1863, the branch was completed to Syosset, and operated by the Long Island Railroad Company. The cost of the road to that point was stated to be \$45,304, and the Long Island Railroad Company paid for its use \$3171.28 per annum, in semi-annual payments. On the 4th of March, 1863, a lease was executed by the Hicksville and Cold Spring Branch Company to the Long Island Railroad Company, reciting the agreement of November 22d, 1853, the completion of the branch road to Syosset, the cost thereof, and that it was deemed expedient to embrace in a separate lease the road so "completed," and also referring to various acts of the legislature extending the time for building the road to Cold Spring. By this lease, the Hicksville and Cold Spring Branch Railroad Company demise "*All their railroad with the iron laid upon the same, as so built from Hicksville to the neighborhood of Philetus Ketcham's, (now called Syosset,) and the land upon which the same is built,* embracing the titles and rights of way granted by various different persons, and including the piece of land at Syosset, which was conveyed to the parties of the first part by John H. Jones, and generally the property as it now exists, the cost of which to the parties of the first part was included in the before mentioned sum of \$45,304, with the appurtenances," for and during the existence of the charter of the Long Island Railroad Company, and any renewals thereof, *unless sooner ended by purchase*, at the yearly rent of \$3171.28, payable half yearly on the 15th of January and July, and the annual taxes "upon and for the said *road and land* with its appurtenances." The lease contains special covenants in relation to the running of trains, &c. with a covenant for quiet enjoyment, and closes with the following covenant: "And it is hereby covenanted and agreed by the parties of the first part, that the parties of the second part shall have the right to purchase the said demised premises at any time, upon payment of the aforesaid cost thereof, namely,

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the sum of \$45,304, and all the rent computed up to the time of said purchase, and that upon such payment the party of the second part *shall be entitled to a conveyance of said demised premises, free from incumbrances.*"

On the 26th of April, 1863, the Long Island Railroad Company elected to purchase the branch road, and notified the Hicksville company of such election, requesting the president to name a time when the Hicksville company would be ready to make the conveyance. To this, the Hicksville company replied by appointing the 29th of May, 1863, at 12 o'clock for the payment of the purchase money and the delivery of the deed, and stated that the purchase money should be paid to the treasurer of the company at his office. The Long Island Railroad Company gave notice of their acceptance of this appointment. At the time and place appointed, the president of the Long Island Railroad Company attended with counsel, and handed the purchase money, and the rent computed to that date (29th of May) to the treasurer of the Hicksville company. The amount was found correct. The president of the Hicksville company and its counsel were present. They produced a deed, which they proposed to execute and deliver, to some clauses in which the counsel for the Long Island Railroad Company objected. The Long Island Railroad Company also claimed that the title of the Hicksville company to its roadway was defective, in that the road passed over the lands of certain persons *the right of way over which had not been procured by the Hicksville company.* Also that in various of the conveyances to that company, the wives of the grantors had not joined, and they had outstanding dower rights therein; and as to a portion of the land, the purchase money agreed upon for the right of way had not been paid, and they required that those *defects should be cured*, or that the Hicksville company should give a covenant of *warranty*. The Long Island Railroad Company refused to accept the conveyance offered, assigning as reasons as well the objections to the form of the deed as the objec-

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tions to the title, and claiming that a good title should be conveyed. The purchase money was thereupon returned by the treasurer of the Hicksville company to the president of the Long Island Railroad Company, and he deposited it in bank, where it has ever since remained, kept at all times in reserve. An executed deed, similar to the one offered on the 29th of May, was tendered to the president of the Long Island Railroad Company, on the 25th of July, 1863, by the attorney of the Hicksville company, and payment of the \$45,304, and of the rent accrued, was demanded. The president requested that the deed, or a copy of it, be left with him for examination, which was declined. The tender was made at three or four o'clock in the afternoon, at Hunter's Point. No previous notice of the tender had been given. The money was not paid. The attorney for the Hicksville company then demanded the rent to July 15th, 1863. It was not paid. The deed so tendered did not obviate the objections existing to the one offered on 29th of May. The title of the Hicksville company to its roadway was in fact imperfect; as to some parcels of land, the right of way had not been procured; as to others, there were outstanding rights of dower.

The Hicksville company brought the first above entitled action for the recovery of the rent falling due on the 15th of January, 1864. The Long Island Railroad Company set up, by way of defense and counter-claim, the covenant to convey, and tender of performance by them, and prayed for a specific performance by the Hicksville company. The Long Island Railroad Company also brought a cross-action for specific performance, being the action secondly above entitled. The court rendered judgment for the rent falling due January 15th, 1864, and also that the Hicksville company do execute and deliver a deed to the Long Island Railroad Company, the form of which is settled by the judge, and that on the delivery of such deed, the Long Island Railroad Company pay \$45,304, with rent to the time of payment.

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The form of deed settled by the judge restricts the covenant against incumbrances, to incumbrances created by the Hicksville company.

*C. A. Rapello and A. J. Vanderpoel*, for the appellant.

*C. A. Hand*, for the respondent.

*By the Court*, LEONARD, J. The Hicksville Company sue to recover six months' rent of their branch railroad, under a written lease with the Long Island Company, and the last mentioned company set up, as a counter-claim, an extinguishment of the right to recover rent arising from a tender of the purchase price of the branch road, under an option or privilege contained in the lease, before the rent accrued, and also demand a specific performance of the agreement to convey, and that the Hicksville Co. may be compelled to perfect their title and extinguish all incumbrances.

The action of the Long Island Co. against the Hicksville Company, is to the same effect as the counter-claim above mentioned.

Judgment was rendered, dismissing the complaint in this action, and in the action of the Hicksville Company, the Long Island Company was adjudged to pay the rent claimed, and the plaintiff was adjudged to convey their railroad, free of incumbrances created by themselves, and upon the delivery of the deed the Long Island Railroad Co. were adjudged to pay the purchase price named in the lease, with interest from the 15th of January, 1864, up to which time the Hicksville Company recovered rent in the said action.

The merits of the controversy were tried in the action of the Hicksville Co. There was no necessity for the cross-action by the Long Island Co., inasmuch as the claim and counter-claim arose out of the same transaction or contract, and it is well settled as law, that a counter-claim, or defense of an equitable nature may be interposed, although the claim

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or demand mentioned in the complaint is purely of a common law nature, or for the recovery of money only.

This rule appears to be in conformity with the provisions of the Code in respect to equitable defenses.

This is the only question involved by the appeal in the action of the Long Island Co. The Long Island Co. required the Hicksville Co. when the tender was made, to convey to them a perfect title, or to convey with covenant of warranty as to the title. The latter Company were willing to accept the money tendered, but the Long Island Co. insisted upon these terms, and carried their money away.

The lease was of the branch railroad, the land upon which the same is built, embracing the titles, &c. and generally the property *as it now exists* (at the time of the lease,) the cost of which is \$45,304, &c.

The right to purchase was of the *demised premises*, upon payment of the said cost thereof, and all rent computed to the time of purchase; and upon payment, the *said demised premises* were to be conveyed, free from incumbrance.

The Long Island Co. clearly required more than their contract permitted, when they made their tender. The tender was, therefore, no bar to the claim for rent, and did not prevent its accruing in future.

The question of specific performance brings into consideration other facts and circumstances. The relief granted is substantially as if the Hicksville Company were permitted the option, and had made a right tender of a deed to the Long Island Co., and had sued for payment of the consideration. There has been no tender by the Hicksville Co. of such a conveyance as the Long Island Co. were entitled to. They offered a deed which has been found by the judge who tried the case to be not in conformity with the privilege granted. The learned judge has prepared a deed, and adjudged that the Hicksville Co. shall execute and deliver such an one to the Long Island Co. This deed contains a covenant against

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their own acts by which incumbrances have been or may be created.

Simultaneously with the delivery of this deed, the Long Island Co. are adjudged to pay the Hicksville Co. the principal sum of \$45,304, with interest, &c. The right of the Long Island Co. to receive the deed, is conditioned upon payment. And from the time of such payment, rent and interest are to cease.

I think it is entirely clear that neither party was in a condition to demand a specific performance in respect to a conveyance of the premises. The Hicksville Company did not demand, but on the contrary resisted, a specific performance in the manner claimed by the Long Island Co. The Hicksville Co. could make no such claim, and had no right of action whatever, to recover the price for a conveyance of the premises demised or leased to the Long Island Company.

The Long Island Co. sought to compel the Hicksville Co. to complete their title, at an additional expense, by the tender of the cost only of the demised premises, as they existed at the time of the lease.

The option does not contemplate that the Long Island Co. shall have a conveyance, except upon payment of cost; and the cost, as the road existed when the lease was executed, was agreed upon at \$45,304. They had the privilege to acquire so much as the Hicksville Co. then had, at that price. If more should be acquired, the cost would then be more, and the Long Island Co. would have the additional cost to bear. That company made no tender for any additional cost; nor could they, for the amount was not known.

There is no covenant on the part of the Hicksville Co, for the acquisition of additional titles. If there were such a covenant, it would not be within the province of a court of equity to decree its performance, and without such a covenant there is not a shadow of claim to compel the acquisition of other titles.

There has never been any indication of an option by the

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Long Island Co. to avail themselves of the right to obtain such a deed as the special term has adjudged. Under the tender, such as it was, that company could not have compelled the execution of such a deed as the court have thought proper to award; literally to crowd upon that company a conveyance which is not regarded as any relief. I can find nothing in the facts which will permit the decree compelling the Long Island Co. to pay \$45,304, as upon an option or privilege of which they have never sought to avail themselves. They have never put themselves in condition to be subjected to such terms. A claim made for relief, or for a deed, upon terms to which a party is not entitled, does not subject him compulsorily to accept a deed upon some other terms. In such a case, the relief demanded should be denied, simply, with or without costs, according to regulated discretion in equity cases.

The court below should have rendered judgment for the rent due, with interest and costs of the action, in the action brought by the Hicksville Co. and have denied the relief demanded by the answer, and should have also dismissed the complaint of the Long Island Company with costs.

The present decree has more the appearance of an award by an arbitrator, to whom the parties had referred their matters in dispute, than the judgment of a court regulated by law and precedent.

I think the decree should be modified in conformity with my opinion, as above expressed, without costs in the first case, and with costs against him in the other.

[NEW YORK GENERAL TERM, April 1, 1867. *Leonard, J. C. Smith and Ingraham, Justices.*]

## McDOUGALL vs. WALLING.

The right to recover for money lost in betting is a demand arising on contract, and may be set up as a counter-claim, under section 150, subdivision 2, of the Code of Procedure.

The right of action for money lost in betting is assignable.

IN February, 1865, McDougall the plaintiff made a bet with the defendant Walling, that Jefferson Davis' government would have their commissioners in Washington within a fortnight to negotiate a peace. If the southern commissioners should not be in Washington in a fortnight, McDougall the plaintiff should lose the stake of \$100, and if such commissioners should be in Washington within that time, the defendant Walling should lose his \$100. Each party to this suit deposited \$100 in the hands of one Pentland, to await the contingency. After two weeks expired, it was conceded that Jefferson Davis' commissioners were not in Washington, and the plaintiff McDougall directed Mr. Pentland to surrender the \$200 to the defendant Walling, and it was supposed that all parties were satisfied, as they then were. But in June, 1865, the plaintiff employed an attorney to commence this suit. The defendant hearing that he was to be sued, purchased of one Clark a claim against the plaintiff amounting to \$100 and interest, which arose under the following circumstances: In 1860, the plaintiff made a bet with Clark, that the democratic majority in New York and Brooklyn in November, 1860, would be thirty-five thousand; McDougall (the plaintiff) and said Clark each deposited \$100 in the hands of one Fuller, as stakeholder, and after the November election in 1860, Fuller the stakeholder decided that McDougall was entitled to the stakes, and the \$200 were paid over by Fuller to McDougall. When the defendant in this suit received an intimation that this suit was to be commenced, he applied to Clark to buy his (Clark's) claim against the plaintiff for the \$100 that McDougall had won from Clark. Clark thereupon, before the commencement

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of *this suit*, sold to the defendant his claim against the plaintiff for the \$100, which the plaintiff had won from him, and when this suit was brought the defendant pleaded it as a counter-claim against the plaintiff's demand, for which this suit is brought. The plaintiff demurred to the defendant's counter-claim; the demurrer was argued before Justice CLERKE at special term, who overruled the demurrer; delivering the following opinion:

CLERKE, J. "Since the decision of the Court of Appeals in *Meech v. Stoner*, (19 *N. Y. Rep.* 26,) it cannot be doubted that the right of action for money lost in betting is assignable. That action was for money lost in gaming; but there is no distinction in principle which could make the one not assignable and the other assignable. The only question, therefore, remaining in this case is whether the right to recover for money lost in betting can be set up as a counter-claim under the second subdivision of section 150 of the Code of Procedure. Does it arise on contract? I think it does. It belongs to that species of implied contracts to pay such sums of money as are charged upon every citizen by the sentence or assessed by the interpretation of the law. In this sense a man is bound by an implied contract to pay judgments recovered against him. In the same way the law implies a contract to pay a penalty, to abide by a forfeiture and an amercement. These implied contracts give a right of action, *ex contractu*, against the party against whom these judgments have been recovered or penalties imposed. So, in the present case, the law declares that the plaintiff had no right to receive the amount in question. Having no right to receive it, he is bound to return it to the owner, the person from whom he won it. In other words, the law imputes an implied contract that this money should be restored by the person who unlawfully obtained it.

Demurrer overruled, with costs; with leave to plaintiff to reply within twenty days on payment of costs of demurrer."

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From this decision the plaintiff appealed to the general term.

*S. H. Harris*, for the appellant. I. The Revised Statutes declare all bets upon unknown or contingent events unlawful, and all contracts for, or on account of any money or property, or thing in action, so wagered, bet or staked, shall be void. (1 *R. S.* 662, § 8.) The bet constituting the defendant's counter-claim was therefore illegal, and the agreement to pay to the winner of the bet the money, as averred in the counter-claim was void. The bet related to a public election, and was void at common law, as against public policy, before the statute was passed. (*Lansing v. Lansing*, 8 *John.* 454. *Vischer v. Yates*, 11 *id.* 23. *Rust v. Gott*, 9 *Cowen*, 169. *Brush v. Keeler*, 5 *Wend.* 250.)

II. 1 Revised Statutes, 662, section 9, gives the loser the right to sue the winner for the money paid him upon the event of the bet. Without this provision, no action could be maintained by the loser after the money was paid to the winner. The reason was that both parties had participated in an illegal act, and were equally guilty, and the law left them as guilty parties without relief. The winner being in possession, his condition was the best, and he was permitted to retain the money won. The design of the 9th section, giving the loser this right of action, was to compel the winner to restore his ill gotten gains. The theory of the statute is, that the winner unlawfully retains whatever has been paid to him; and that its retention by the winner may not be an encouragement to vice, the loser has this statute right to sue.

III. The defendants' counter-claim is not available as a defense. It does not arise on contract. The word contract, in section 150 of the Code, subdivision 2, does not embrace a simple statute right to sue for moneys lost in an illegal transaction. It means contracts in the usual sense of that term—a debt or damages arising out of contract. The cases of *B. F. H. v. S. H.* (40 *Barb.* 9; *The Mayor v. The Parker*

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*Vein Co.*, (12 Abb. 300 ;) *The Zenia Bank v. Lee*, (7 id. 389, 390,) hold that the word contract in subdivision 2 of section 150 of the Code does not refer to duties raised by law, where in truth no contract exists. The obligation of an inn-keeper to respond in damages for the goods of his guest that may be stolen, is a duty raised by law ; but it cannot be said to arise on contract. On the contrary, it is always classed among demands *ex delicto* ; so an action for a false warranty.

All acts or omissions which the law recognizes as the subjects of its provision or application in civil actions, are either contracts or torts ; contracts are agreements express or implied ; torts are injuries or omissions done to individuals. Injuries may be by nonfeasance, not doing that which it was a legal duty to perform. In this case, if the statute raises an obligation that the winner repay the money, his failure to do so is a nonfeasance, in regard to an obligation the law imposes upon him. The winner wrongfully retains the money won. This is an injury, and comes under the classification of torts. (1 *Hilliard on Torts*, 2. *Chitty's Gen. Prac.* 8. *Betts v. Hillman*, 15 Abb. 184. *Bevins v. Reed*, 2 Sand. 486. *S. C.* 40 Barb. 9, 10.) If it were conceded that the statute giving a right of action for money lost upon a bet raises a duty that the winner repay the same, it would not by any means follow that this duty is a contract within the meaning of section 150 of the Code. The learned justice at special term cited a judgment, as an illustration. A judgment is a debt of record, but a mere right to sue is not of itself a debt, nor is it a demand. It is simply what the statute says it is, "The right to sue." (*Jacobs' Law Dict.* "Debt." 3 *Black. Com.* 154. 1 *R. S.* 622, §§ 8 and 9. *Denny v. Man. Co.*, 2 *Hill*, 220.) Debt imports a sum due upon contract, express or implied. (2 *Hill*, 220.) This right to sue may be assigned. So may a right of action for the conversion of personal property ; both rights of action, however, arise from a wrongful act committed. In one case it is a conversion of personal property. In the other the conversion of the money

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belonging to another. But it is an error to say that the statute raises any duty of the nature of a contract that the winner repay the money. When a judgment is recovered against him, that judgment may raise a contract obligation to pay it, but the loser's simple right to sue does not. The winner unconscientiously retains the money won. He illegally came into the possession of it. The statute gives the loser the right of action for what is illegally retained by the winner. (*See Bevins v. Reed*, 2 Sandf. 436.) The law may imply a contract to pay a penalty or abide by a forfeiture, because the one or the other may be imposed as a condition of receiving or accepting the benefit of transactions which are illegal. This is not such a case. The loser's right to sue is not for a penalty or forfeiture. The counter-claim is not based upon any implied contract of the winner to pay. It is the right to sue under the statute that is the subject of the counter-claim. Whatever may be the nature of the obligation of the winner to pay, it is very certain that the *loser's claim* is simply a *right to sue*.

IV. There being no right of action except by statute, and the statute giving the loser only the right to sue, is not available as a defense. The case of *Bevins v. Reed*, (*supra*), decides expressly that such a claim as is here set up as a counter-claim cannot be thus used, but can only be enforced *by an action against the winner*.

V. Assumpsit does not lie to recover of the winner the money lost. (*Bevins v. Reed*, 2 Sandf. 436. *McKeon v. Caherty*, 1 Hall, 300.) The transaction being unlawful, the winner is a tort-feasor, and the claim against him partakes of the nature of a tort. (*Betts v. Hillman*, 15 Abb. 184, 187.) This case holds that the illegal transaction partakes of the nature of a tort.

The case of *Meech v. Stoner*, (19 N. Y. Rep. 26,) holds that the retention of the money by the winner is a wrong done to the estate of the loser, and that the recovery by the loser is for the wrong. This case virtually places the winner's

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right of recovery upon the same ground as an action for the wrongful detention of property, which is an injury or tort, and not the subject of counter-claim according to the whole course of decisions since the Code was enacted.

VI. Our proposition on this appeal may be stated in a word: That the plaintiff's action is for a wrong done to his estate, and that the defendant's counter-claim is for a similar wrong done by the plaintiff to the estate of the defendant's assignor, and that such rights of action cannot be set off against each other, as they do not arise out of the same transaction; both parties are tort-feasors. (40 Barb. 9. *Henry v. Henry*, 17 Abb. 411.)

*E. J. Sherman*, for the respondent. I. The counter-claim of \$100 pleaded by the defendant was assignable. Clark had a valid claim for that sum, against the plaintiff—a claim recognized by statute, and for which he could have brought his action against the winner, the plaintiff, as well as against Fuller, the stakeholder. This question is fully discussed and has been settled by the Court of Appeals in *Meech v. Stoner*, (19 N. Y. Rep. 26.)

II. The statute expressly declares *void* all contracts of the kind made between the plaintiff and Clark. (*See 1 R. S. Edm. ed. p. 614, § 8, and authorities there cited.*) The contract being void, no one except Clark could have any title to the \$100 that Clark deposited with the stakeholder Fuller. When it was paid over by Fuller to the plaintiff, it still was so much money belonging to Clark, in the plaintiff's hands. Clark could assign and transfer his claim to it to the defendant in the same manner as any other claim.

III. The plaintiff may contend that the statute only gives the right of action to Clark to sue for this money; this is true. This counter-claim is not pleaded upon or by permission of any statute. This counter-claim is simply a claim for so much money once belonging to Clark in the plaintiff's

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hands, and sold by Clark to the defendant, and now owned by him the defendant.

IV. If the plaintiff held in his hands \$100 belonging to Clark, the law raises an implied promise, *i. e.* a contract by the plaintiff to pay it to Clark. Clark can assign this claim to any person; he has assigned it to the defendant.

V. It is submitted with great confidence that there is no distinction in principle between the rights of the parties in the case of money lost or won at betting, and the case of money lost or won at gaming. The right to sue is good in both cases by statute to the loser, the whole transaction being void.

*By the Court*, LEONARD, P. J. The opinion of Judge CLERKE in this case, when before him at special term, is entirely satisfactory.

The winner of money by betting or gaming has so much belonging to the loser. The winner cannot defend himself against the claim of the loser by virtue of the gaming or betting contract under which he acquired the money, because the statute says the contract is void. The winner has so much of the money of the loser to which he has no title. The winner is in the condition of one who has found a sum of money belonging to another. There is an implied contract to pay it to the loser. So when money has been obtained by fraud or violence, the injured party may waive the wrong, and sue as upon a promise, the law implying a promise from the moral obligation. The injured party has a choice of forms of action.

The statutes against betting and gaming demand a liberal construction. They are remedial, not penal.

I think the defendant's counter-claim should be held to be a demand arising on contract. Whenever the loser chooses to bring his action for money lost by betting or gaming, in form *ex contractu*, the action is properly brought. The case of *Meech v. Stoner*, (19 *N. Y. Rep.* 26,) settles not only

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that the cause of action in such a case is assignable, but also that the demand for money lost at gaming is a debt. The same principles apply also to betting.

The judgment should be affirmed, with costs.

[NEW YORK GENERAL TERM, April 1, 1867. *Leonard, James C. Smith and Ingraham, Justices.*]

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**WILLIAM COLEMAN, adm'r, &c. and others, vs. THE SECOND AVENUE RAILROAD COMPANY, impleaded with Benjamin T. Sealey.**

On the 11th of December, 1852, the common council of the city of New York granted to P. and others the perpetual right to build and run a railroad through the Second avenue, for the transportation of passengers. On the 15th of December, 1852, an agreement, pursuant to the resolutions of the common council, was entered into between the city and the grantees, by which the latter accepted the grant, and, for themselves and "their successors" agreed that they would fulfill and keep the stipulations, conditions, &c. On the 12th of January, 1853, a company called the "Second Avenue Railroad Company," was incorporated under the general railroad act, the directors in which were all the grantees named in the license, and four other persons. And by an instrument dated January 25, 1853, and signed by all the grantees but one (M.) they assigned the grant to the said railroad company, for the consideration of \$200,000, no part of which was ever paid. The company was organized with the expectation that the grant was to be transferred to it, and the assignment was executed pursuant to the plans of the promoters of the company. In an action by the assignee of the grantees, against the railroad company to recover the consideration agreed to be paid by the latter, for the transfer,

- Held*, 1. That the principle that trustees, directors and others, acting in a trust relation, cannot make valid contracts with themselves, affecting the trust estate, was applicable to such assignment.
2. That it was not in the power of the owners of the grant from the city, after having formed themselves into a corporation, and having held out the idea that the corporation owned the right to the road—to name the price for the transfer of the grant from themselves to the company, and to vote as directors of the corporation, to themselves as owners of the grant, the whole capital stock, for the privilege obtained from the city.
3. That the same reasons which prevented the directors of the railroad com-

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pany from fixing their own value upon the grant, operated to preclude them from making any acknowledgments by resolution signed by their secretary and entered in their minutes, which would have the effect to take the case out of the statute of limitations.

4. That the fact of the grant having been assigned by an instrument under seal, had no bearing upon the question of the statute of limitations; the action not being brought upon the assignment, or for the breach of any agreement under seal, but to recover the price of property conveyed at an agreed or implied valuation. And that more than six years having elapsed, since the sale, the statute was a conclusive bar.

THIS is an appeal from a judgment against the defendants, the Second Avenue Railroad Company, for \$246,791.93, entered herein on the 28th day of June, upon the report of Hon. Benjamin W. Bonney, referee, dated 7th June, 1866, and upon the findings of fact and of law in said report contained. The action is *assumpsit*, brought by the plaintiff Coleman in his own right, and as administrator, and Catharine Mulligan, administratrix, &c. of Richard T. Mulligan, deceased, to recover the sum of \$200,000 and interest, expressed in and alleged to be the consideration of the transfer to the defendants by the plaintiff's assignors of the license (called for convenience a grant) from the corporation of the city to Denton Pearsall and others, dated 15th December, 1852, hereinafter more fully set forth. On the 15th December, 1852, the mayor, &c. of New York granted a license to Denton Pearsall, Richard T. Mulligan and others, "to lay a grooved railroad track" in certain streets and avenues named (comprising the route of the Second Avenue railroad) under certain restrictions, and subject to regulation by the common council as to fare, &c. The parties named agreed for themselves and "their successors" that they would fulfill and keep the stipulations, conditions, &c. In the resolution of the common council authorizing the license, the parties to whom it is to be granted are mentioned as the "said company," an incorporation of the associates being evidently contemplated. By the terms of the license, the road was to be commenced in six months, and completed to Forty-second street within one

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year, and to Harlem river within three years. On the 13th of January, 1853, the persons named in the license, (except Daniel J. Sherwood,) together with William L. Youle, (who had acquired one-fourth interest in the grant,) calling themselves "The Grantees for the Second Avenue Railroad Company," met pursuant to previous call. A committee was appointed to advise with counsel and report "the most advisable manner of organizing the company." An adjourned meeting of "the grantees of the Second Avenue Railroad Grant" was held January 17th, 1853. Present, all the persons named in the license and William L. Youle. The committee unanimously recommended "an organization under the general railroad act," and the report was adopted unanimously. The name of the company was agreed upon, the term of existence fixed, and the shares were fixed at \$100 each. The capital stock of the company was fixed at \$800,000, with the privilege of increase to \$2,500,000. The secretary *pro tem.* was directed to procure a book for the copying of the minutes of the company. The secretary was directed to wait on the counsel and have him prepare the certificate and other papers necessary for organization, "which the grantees are hereby requested to call at Mr. Davies' office and execute." The secretary was directed to have a copy of the by-laws to submit to the next meeting. January 20th, 1853, another meeting was held.

The secretary reported, "having had the necessary papers prepared for organization under the general railroad act," and Mr. Davies, the counsel, reported having obtained all the necessary signatures, and deposited the papers in the post office, directed to the comptroller at Albany, and reported the names of the directors, for the first year, inserted therein. The names of the directors were: D. Pearsall, Abm. Allen, D. J. Sherwood, Chas. Miller, Henry Goff, J. C. Skaden, R. T. Mulligan, W. L. Hall, A. B. Rapele, (all the grantees named in the license,) and W. L. Youle, Adam W. Youle, Zophar Pearsall, Chas. Hawkins, (not named in the license.)

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The certificate of incorporation was dated January 19, 1853, and acknowledged and sworn to on the 20th of January, 1853, and filed on the 21st day of January, 1853. It stated that \$1500 had been in good faith paid to the directors on the subscription.

The certificate of incorporation was signed by twenty-five individuals (the necessary statutory number), including all the "grantees" and the four others named as directors, and each agreed to "take the number of shares of stock in said company set opposite to his name."

Denton Pearsall subscribed	1400 shares.
W. L. Youle subscribed	1400 shares.
Abraham Allen subscribed	800 shares.
Each of the others (22) subscribed for 200,	4400 shares.
	<hr/> 8000

Thus absorbing the whole capital of \$800,000.

The entire stock was taken for the benefit of the "grantees" and W. L. Youle, in the following proportions, viz.

Denton Pearsall and W. L. Youle (assignee of a portion of Pearsall's interest,) each 2000 shares,	4000
A. Allen, 1200 shares,	1200
The others, (seven in number,) 400 shares each,	2800
	<hr/> 8000

No other person appears to have been interested in any of the stock, or to have made any payment thereon, until June 3, 1853. They are called "shareholders" in the call for \$1,500 made on the 20th January, 1853, and respond to the call as such, by paying, on that day, precisely that sum in part payment for the whole 8000 shares.

By an instrument dated 25th of January, 1853, and signed by all the grantees but Mulligan and by William Coleman, as his administrator, C. Mulligan, Mary E. Mulligan and Jas. B. Mulligan, for Mulligan's interest, they assigned the grant to the railroad company for the consideration of \$200,000, expressed therein. This, though bearing date the 25th of

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January, 1853, was not executed and delivered until November, 1855. At the same time the defendants passed a resolution to issue their bonds to the grantees, for \$200,000, payable in ten years, with semi-annual interest. But it was admitted by the pleadings that the \$200,000 consideration money in the assignment had never been paid.

The whole interest in the subject matter of the action was vested in the plaintiffs and the defendant Sealey. The evidence of this was as follows: Letters of administration to the plaintiffs, upon the estate of R. T. Mulligan, deceased, dated December, 1854. Assignment to the plaintiff Coleman, dated December, 1861, from D. Pearsall and seven others of the grantees, who then owned all the interests, except such as belonged to Sealey.

Thus the whole interest, and the claim for its price, was centered in Coleman, the administrator of Mulligan, and Sealey. Sealey, having refused to be plaintiff, was made a defendant.

The referee reported in favor of the plaintiffs for the amount claimed, with interest; and the defendants appealed from the judgment.

*John Slosson, Wm. F. Allen and W. Hutchins*, for the appellants. I. The resolutions of the common council, embodied in the agreement of the 15th of December, 1852, giving permission to the plaintiffs' assignors to lay a railroad track in Second Avenue, &c. are absolute in their terms, unlimited as to time, and without the reservation of any right of revocation. *If valid*, they created in the grantees a species of freehold interest in the soil of the street, and constituted, when accepted by them, an irrevocable contract, which the corporation could never annul, and they created a franchise, which no power but the sovereign (the legislature) can create. No power of this description has ever been delegated to the common council by the sovereign power. The rights of the corporation in the public streets are held by

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them in trust for the people, and its control over the streets is one of mere police regulation. Those resolutions, therefore, were *void*, as purporting to create a franchise which the common council had no power to create, to vest in the grantees an exclusive interest which that body had no power to convey, and as divesting the corporation of its exclusive control over streets, which it holds in trust for the public, and is not authorized to relinquish. (*Milbau v. Sharp*, 27 N. Y. Rep. 611. *People v. Kerr*, *Id.* 188. *Davis v. The Mayor*, 14 *id.* 506.) These decisions are not affected or changed by the case of *The Mayor v. The Second Avenue Railroad Co.* (12 Abb. 364, *affirmed*, 32 N. Y. Rep. 261.) The question there arose between the *two parties* to the agreement, and the Court of Appeals expressly refused to consider the question of the *validity* of this grant. The court said "it was not open to controversy *in this litigation*," and that "after the grant of the franchise," &c. "the common council were not in a position to *deny* the *legal* existence of the franchise." The great question in that case was, whether the common council, under its legislative power, could impose a *tax for revenue* on this company, under the name of a license fee.

II. But if these resolutions and agreement of the 15th of December, should be held not to be absolutely void, but to constitute a species of permissive license, or as conferring some rights, those rights (by whatever name they may be called) vested, by operation of law, in the corporation as soon as it was formed, and were subsequently confirmed in the corporation by the act of April 4, 1854.

III. The grantees, by the constitution and by-laws which, as directors, they adopted, have, in express terms, vested in the shareholders of the company all their rights under the grant, and, as well by said constitution and by-laws as by their acts, and their relation as trustees, are estopped from denying this. Had a transfer of the grant to the company at any time been necessary to the exercise by the defendants

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of their corporate franchises, they could have enforced it in equity without any pecuniary equivalent.

IV. It follows from all this that there was no consideration for the transfer of it in November, 1855, on which this action is based.

V. There was no contract or agreement, and, in the nature of things, there could be none upon which the plaintiff can recover; and this question was distinctly raised at the close of the plaintiff's case, and at the close of the trial. The foundation of the action, and the recovery, was the pretended assignment, bearing date January 25, 1853, but never executed until November, 1855, and the resolution of the directors of the defendants, adopted November 15, 1855; rescinded November 20, 1855, but relied upon as an agreement to pay a given sum therefor. There were present of the directors at the meeting of November 15, 1855: 1. Denton Pearsall, 2. Daniel J. Sherwood, 3. A. B. Rapelye, 4. R. H. Goff, original licensees, 5. W. L. Youle, an assignee of ten equal shares or parts of the license, from January 10, 1853, and before the incorporation of the defendants, until January 24, 1862, when he assigned to the plaintiff; 6. William Coleman, the plaintiff, who is also administrator of R. T. Mulligan, one of the licensees, 7. Adam W. Youle, 8. Charles H. Hawkins, 9. James B. Mulligan. The directors not present, were: 1. Charles Miller, 2. Joseph C. Skaden, both original "licensees," 3. James B. Mulligan, one of the assignors to the defendant, 4. Zophar Pearsall.

Of the nine directors present, six were interested adversely to the corporation in the transaction. Of the thirteen directors present and absent, eight were thus interested.

A contract or agreement, no matter how formal and deliberate, or by what solemnities entered into, between directors or trustees of a corporation, and especially a majority of such directors or trustees, and the corporation, which can only operate by and through its board of directors, either of sale or purchase, *or fixing the price and value of the thing*

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*bought or sold, is absolutely void.* (1.) Directors of a corporation are trustees of an express trust, and act in a fiduciary capacity for the shareholders, and are subject to all the rules by which trustees are controlled and restricted in their dealings with their *cestui que trust*, or in respect to the trust funds or property. (*Cumberland Coal Co. v. Sherman*, 30 Barb. 553, and cases cited by the court. *Abandon Railway Co. v. Blaik*, 1 McQueen, 461. *Davoue v. Fanning*, 2 John. 252. *Michoud v. Girod*, 4 How. (U. S. R.) 503. *N. York and North Midland R. R. Co. v. Hudson*, 16 Beav. 485. *Robinson v. Smith*, 3 Paige, 222. *Olafin v. Farmers and Citizens' Bank*, 25 N. Y. Rep. 293. *Kenerwell v. Greitung*, 2 Gratz's cases, (Pa.) 125.) (2.) Although a majority of the directors have no interest adverse to the corporation, a contract or agreement in behalf of the corporation with one of these associates and a co-director, will not be sustained. The shareholders as well as the directors are entitled to the benefit of the services and advice of every director, and no one may, for his own advantage, in matters concerning his own interest, deal with his associate directors. (Cases cited above. *Whicheote v. Lawrence*, 3 Ves. 751.) In the present case, two-thirds of the directors present were interested adversely to the corporation and the *cestui que trust* for whom they were bound to act "with honesty and fidelity." (3.) The case cannot be brought within the principle of the cases which have, to a limited extent, and upon its being shown beyond all question that the contract or dealing has been in all respects fair and equal, and after full information to the *cestui que trust*, sustained contracts and dealings between the trustees and *cestui que trust* in respect to the trust property. These cases only apply where the *cestui que trust* is *sui juris* and competent to deal for himself. Even such transactions are sustained with great hesitancy, and the leaning of the courts is against them. The *onus* in such cases is always on the trustee. (*Story's Eq. Jur.* §§ 30, 311, 321. *Edwards v. Myrick*, 2 Hare, 60. *Coles v. Trecothick*,

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9 Ves. 247. *Hatch v. Hatch*, Id. 296. *Morse v. Royal*, 12 id. 372.) The legal presumptions are against such transactions. (4.) Neither is the case within the principle of a very few cases, in which, by a divided court, it has been decided that a director of a corporation may recover for services performed, under a contract with the other directors, when the evidence establishes the fairness of the contract and partiality and fraud is negatived. (*Geer v. School Dist.* &c. 6 Verm. Rep. 76. *Rogers v. Danbury U. Society*, 19 id. 191. *Sawyer v. Meth. Ep. Soc.*, 18 id. 409.) There is not a particle of evidence as to the value of the transfer of the right and franchise professed to have been assigned. The rule prohibiting trustees and agents from dealing with their *cestuis que trust* and principals, or in the matter of their trust or agency, is elementary. This is one of the fundamental doctrines, equally recognized by the common law and in equity, in respect to which there is but one language, and that is condemnatory of every violation of this wholesome restriction. The reason and necessity of the rule are well exemplified in this case. The following are a few of the cases illustrative of the rule. (*N. Y. Cent. Ins. Co. v. Nat. Prot. Ins. Co.*, 4 Kern. 85. *Utica Ins. Co. v. Toledo Ins. Co.*, 17 Barb. 132. *Brentley v. Columbian Ins. Co.*, 17 N. Y. Rep. 421. *Packhurst v. Alexander*, 1 John. Ch. 194. *Reed v. Warner*, 5 Paige, 650.) (5.) Courts will set aside contracts of this character, upon the application of a single shareholder—a *fortiori*, the faithless trustees cannot be permitted by themselves or their assignees to enforce the illegal contract by action brought for that purpose. (*Angell & Ames on Corp.* §§ 391–193. *Robinson v. Smith*, 3 Paige, 222. *Abbot v. Am. Hard Rubber Co.*, 33 Barb. 580.) Here every shareholder, through the directors, protest against the claim, and demand to be released from the pretended contract and agreement. (6.) The alleged contract was on the 20th of November, 1855, rescinded by the unanimous vote of twelve or thirteen directors, the plaintiff and his assignors

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voting to rescind. This act was a clear and distinct relinquishment of all claim under the resolution of the 15th of November. (2 *Pars. on Cont.* 189 *et seq.* and cases cited in note. *De Peyster v. Pulver*, 3 *Barb.* 284.)

VI. The action was barred by the statute of limitations. The cause of action accrued, if at all, on the 15th of November, 1855. The action was commenced December 9, 1861. This objection was taken at the close of the plaintiff's case, and again at the close of the evidence, and overruled on each occasion, and an exception taken to the ruling. (1.) The cause of action was within the six-year limitation prescribed by the statute. (*Code*, § 91. *Borst v. Corey*, 15 *N. Y. Rep.* 505. 6 *Cowen*, 445. 14 *J. R.* 210. 20 *id.* 338.) (2.) There has been no partial payment to take the case out of the operation of the statute, and an "acknowledgment or promise" to prevent the operation of the statute upon the claim must be contained in some writing, signed by the party to be charged thereby." (*Code*, § 110.) (3.) The promise must be explicit, or the acknowledgment be of an existing liability, and of a present willingness to pay. A mere acknowledgment of the existence of the debt, and that it has not been paid, is not sufficient. (*A'Court v. Cross*, 5 *Bing.* 329. *Commercial Mut. Ins. Co. v. Brett*, 44 *Barb.* 489. *Bloodgood v. Bruen*, 4 *Seld.* 362. 2 *Pars. on Cont.* 347. *Angell on Lim. ed. of* 1861, § 231. *Winchell v. Hicks*, 18 *N. Y. Rep.* 558.) (4.) The promise must be directly to the creditor or some one acting for him. (*Wakeman v. Sherman*, 5 *Seld.* 85. 2 *Story's Eq. Jur.*, § 1521 a.) (5.) The action is upon the new promise, or promise implied from the acknowledgment relied upon, and the promise, express or implied, must be unconditional and to pay presently, or the proof must show the condition to be complied with and a cause of action upon the new promise. (*Winchell v. Hicks*, 18 *N. Y. Rep.* 558. *Bush v. Barnard*, 8 *John.* 407. *Watkins v. Stevens*, 4 *Barb.* 168. *Wakeman v. Sherman*, 5 *Seld.* 85.) There was no promise, and no acknowledgment proved or found by the referee which

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takes the case out of the statute of limitations. There was no promise or acknowledgment by any competent party. The act relied upon (the resolution of March 3, 1856) was the unauthorized, illegal and void act of the plaintiff's assignors. They claiming to be creditors, and being trustees and directors of the defendants, assumed as trustees to act in behalf of the corporation in matters in which they were personally interested. This the law does not permit. Seven of the eleven directors present were interested as original licensees or assignees of licensees, and had signed the transfer. (*See cases cited above as to the powers and duties of agents and trustees.*)

The promise is not explicit and to pay presently, and the acknowledgment does not indicate a present willingness to pay. The promise, if promise it was, was to pay in a particular way and at a given time, and the acknowledgment must be read in connection with the express undertaking, and no promise or willingness to pay other than in the way and at the time indicated, can be implied. There was, then, no cause of action upon the new promise, at the time of the commencement of the action. There was no promise or acknowledgment to the creditors or any one acting in their behalf. At most, it was but a private memorandum made by the debtor for his own use, and never delivered to or acted upon by the creditor. It was attested for the purposes of the debtor by the secretary of the corporation. The secretary never had authority to make any new promise for the debtor. He simply recorded for preservation the acts of the directors, for the benefit and use of the corporation. This was no promise to the creditors. In fact, it was but an *entry by the creditors in the books of the debtor*, with the intent to make evidence in support of the claim. In any event, until delivery to the creditor, it did not constitute an available promise for any purpose. (*Smith v. Eastman*, 3 *Cush.* 355.) The new promise was not under the seal of the corporation, or signed by any one having authority to sign for the corporation, and to bind it by a new promise,

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and thus make, continue or revive an obligation. The signing must be by the party or his authorized agent, and *with intent* to execute a valid instrument and to give authority and validity to the undertaking. (2 *Pars. on Cont.* 286, 7. *Angell on Lim.*, ed. of 1861, § 272. *Hyde v. Johnson*, 2 *Bing. N. C.* 776.) To comply with the statute, the promise or acknowledgment should have been under seal of the corporation. (*Fulton Bank v. N. Y. and S. Canal Co.*, 1 *Paige*, 311. *Rex v. Windham, Cowp.* 377. 2 *Pars. on Contracts*, 288, 9.)

2. The new promise, like the original promise by the party in interest, professing to act for his debtor to himself as the creditor, is void. (25 *N. Y. Rep.* 293.) 3. The rescinding of the resolution of March 3, 1856, on the next day, by the same parties who passed it, and who were the parties beneficially interested, was a voluntary waiver and abandonment of all benefits under it. It was as if the first resolution had never been passed.

VII. The judgment should be set aside, and the complaint dismissed, or a new trial ordered, with costs.

*J. W. Edmonds*, for the respondents. I. As to the statute of limitations. In December, 1852, the grant was made to individuals. In January, 1853, the defendants were incorporated and a sale of the grant to them was agreed upon. In November, 1855, the individual grantees conveyed the grant to the defendants by an assignment under seal, in which the consideration was expressed at \$200,000. At the same time the defendants passed a resolution to issue their bonds to the grantees for \$200,000, payable in ten years, with semi-annual interest. In October, 1853, before the assignment of the grant had been executed, the defendants gave a mortgage of \$60,000 to John O'Brien, on their real estate and rolling stock, and the grantees gave a mortgage on the grant as collateral thereto. In April, 1854, the defendant's gave a mortgage to Enoch Dean for \$300,000, on the same premises, not

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including the grant. In December, 1857, the defendants gave a mortgage to Martin J. Sheldon for \$350,000, on the same premises and including the grant. All these mortgages were given to secure the payment of bonds issued by the company. In March, 1856, the defendants passed two resolutions; one of which declared that the grantees had not been paid their \$200,000, but had still a "valid claim against the company for the same." And the other directed that bonds should then be issued to the grantees for the same. These resolutions were entered in full on the minutes of the company and signed by the secretary, and a copy of them, signed by the secretary, was delivered to the grantees. The second of those resolutions (not the first, nor both) was rescinded four days afterwards. This action was commenced on the 9th December, 1861.

On this state of facts and in answer to the plea of the statute of limitations, the plaintiffs insist: I. The action is on a sealed instrument, and the limitation is not six but twenty years. Section 90, of the Code, is, "an action on a sealed instrument." Now this action is on a sealed instrument. It is not material what is the form of the action, whether assumpsit, debt or covenant. As in an action against the assignee of a lease for rent; or on covenants running with the land; or in debt, for escape, though case would lie; or debt against a sheriff for money collected on a *fi. fa.* where assumpsit would lie; or debt on an award where the submission was by parol. (*Smith v. Lockwood*, 7 Wend. 241.) In these, and kindred cases, it is not the form of the action but the nature of the debt which controls, namely, whether it was by parol or on a sealed instrument. (*See Blanchard on Lim.* 91, 1 Law Lib. 47.) The material question is, is this an action upon a sealed instrument? (*Pratt v. Huggins*, 29 Barb. 284.)

II. If, however, the claim is founded on a parol contract, the acknowledgment of the defendants was sufficient to bar the statute. 1. The board of trustees had authority to make such an acknowledgment. (*St. Mary's Church v. Cagger*,

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6 Barb. 576. *Crew v. Petit*, 3 Nev. & Man. 456. S. O. 1 Ad. & E. 196.) 2. It was competent for the secretary to make a proper "signing" within the statute. (Code, § 110. *Angel & Ames on Corporations*, 231.)

III. The resolution of March 7, 1856, rescinding one of the resolutions of March 3, in nowise affects the question. 1. It does not profess to rescind the acknowledgment of indebtedness, but only that proposing a mode of paying it. 2. It was not competent for the defendants to recall their acknowledgment. The legal effect of an acknowledgment is that of a promise to pay an old debt, which promise the law implies from the acknowledgment, and for which the old debt is a consideration in law. (2 *Greenl. Ev.* § 440, note 1. *Story on Cont.* § 1013.)

IV. The acknowledgment was made to the proper parties and not to a stranger. Several of the grantees, to whom the debt was owing, were present when the resolution was passed, and a duly authenticated copy of it was delivered to them. Their consent or intention to accept will be presumed, where nothing to the contrary appears, for the law will presume that a party will accept what is for his benefit. (2 *Ph. Ev. by Edwards*, 662. *Doe v. Knight*, 8 Dow. & Ry. 348. *Stirling v. Vaughan*, 11 East, 623. *McKinney v. Rhoades*, 5 Watts, 344. *Waller v. Todd*, 3 Dana, 513. *Church v. Gilman*, 15 Wend. 656. *Jackson v. Bodle*, 20 John. 184. *U. S. v. Wilson*, 7 Peters, 150. 1 *Ph. Ev. by Edw.* 609.) A delivery may be inferred from words without acts, and from acts without words. (2 *Ph. Ev. by Edw.* 662. *Goodrich v. Walker*, 1 John. Cas. 250. *Verplank v. Sterry*, 12 John. 536.) A formal delivery is not essential where it is intended to take effect. (*Doe v. Knight*, 8 Dow. & Ry. 348.)

II. The defendants insist that at the time of the assignment of the grant to them in November, 1855, they were in the possession and enjoyment of the grant and its privileges, and were the owners thereof. To which we answer :

1. It is true they were in possession and enjoyment of the

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grant, but under an agreement to sell it to them for \$200,000, which agreement was consummated in November, 1855, by the execution of the assignment on the one part, and the agreement to issue bonds in payment on the other part.

2. The defendants were never *owners* of the grant until the assignment was executed, and up to that time all the parties regarded the grantees as the owners. Then, as a matter of fact, it is not true that the defendants were owners at the time of the assignment.

3. For the consideration money expressed in the assignment, which assignment the defendants accepted, an action will lie against them, it being admitted that such consideration money had never been paid. (*Shephard v. Little*, 14 *John*. 210. *Brown v. Bell*, 20 *id.* 338.)

III. The defendants insist that the grant was void, and conferred no privileges on grantees or company. To which we answer :

1. In their first point of defense, they admit they were in possession of the grant, and were running their road under it.

2. It was confirmed by the legislature. (2 *Laws of 1854*, p. 324, § 3.) The confirmation was of all grants then (April 4, 1854) in part constructed. The evidence was that at that time, this road was built from Peck slip to 42d street. In 1855, they had a grant made to them of a right to bridge the Harlem and Bronx rivers. (2 *Laws of 1855*, p. 712.) In 1857 a law passed authorizing a change of route. (*Laws of 1857*, p. 177.) 3. As evidence of the value of the grant, it was proved that one of the grantees was paid \$3000 for 1-40th. 4. In a suit of the city against the defendants, to recover an annual tax on each car, the defendants set up, as a successful defense, this very grant. (12 *Abb. Pr.* 304.) 5. In their annual reports for 1854 and 1855, the defendants state the whole value of their property at \$1,000,000, yet they had expended only \$727,741.05. 6. Such grants as this was, whether by the common council or legislature, are held to be property,

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and valuable as such, and not mere revocable licenses. (*Drake v. Hudson River R. R.*, 7 Barb. 536, 558. *O'Connor arguendo*, 22 *id.* 455, and 3 Abb. 262. *Plant v. Long Island R. R.*, 10 Barb. 26. *Milhau v. Sharp*, 15 *id.* 214, 228. *S. C. Court of Appeals*, 27 *N. Y. Rep.* 611. *Mayor, &c. v. 2d Av. R. R.*, 12 Abb. 364, 7. The defendants uniformly treat the grant as valuable property.

IV. The defendants claim that the grant was given to them by the grantees, to which we answer: 1. There is no evidence of this. 2. The claim is a mere inference from the fact that the grantees became directors of the company. 3. The directors or grantees were not the only stockholders of this company. The whole number of shares was 8000. The grantees had 3600 shares, and so they made a present of this grant to the owners of the 4400 shares, who had no interest in it, except by gift or purchase. That is the plain English of this claim. The grantees were nine; the directors were thirteen. 4. The mention of the consideration in this conveyance is *prima facie* evidence of the amount. (4 *Kent's Com.* 562. 1 *Greenl. Ev.* § 26, n. 1. *Maigley v. Hauer*, 7 *John.* 342. *Jackson v. McChesney*, 7 *Cowen*, 361. *Thalheimer v. Brinckerhoff*, 6 *id.* 102.)

5. It being admitted in the pleadings that the consideration money has not been paid, assumpsit will lie for it. (*Shepherd v. Little*, 14 *John.* 210. *Bowen v. Bell*, 20 *id.* 338. *Whitbeck v. Whitbeck*, 9 *Cowen*, 266, 270. *McCrea v. Purmort*, 16 *Wend.* 460, 475.)

6. That the claim was valid and outstanding, has been over and again admitted by the railroad company. In June, 1853, when \$300,000 of stock is disposed of, grantees to be paid the amount advanced by them towards building the road. In July, 1853, to divide \$500,000 of stock among grantees. December, 1853—Grantees to have full stock for the amount paid in, and scrip be left with the treasurer. January, 1854—Treasurer's report, \$70,200 paid in by grantees; \$81,700 by stockholders. September, 1854—\$400,000 to be placed

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to credit of grantees. December, 1854.—\$100,000 to be placed to the credit of grantees. February 3, 1855.—Rescinding resolution as to \$400,000 stock to grantees. November, 1855.—Bonds for \$200,000 to be issued to grantees. It was at this time the assignment of the grant to the company was actually made and delivered.

November 1855.—That resolution rescinded. This was after the assignment had been made.

February 6, 1854.—Certificate of election which was held "pursuant to grant, charter and by-laws." March, 1856.—Committee appointed in relation to payment for grant. This was by the new board, and two of the new directors were on the committee. O'Brien, the chairman.

May, 1856.—On motion of O'Brien, Hutchins and Rapelye were added to the committee. July, 1856.—Committee reported, and report accepted; committee continued. The propositions of that committee. Note, how the committee was formed. 7. The mortgages given for the debts of the company recognize the claim. 8. The original grant and the assignment, (specifying a *sale* for \$200,000, not a gift,) are in the possession of defendants, and by them now produced, so that it was delivered to, and accepted by the company, for the consideration of \$200,000. (2 *Greenl. Ev.* § 297.) 9. All these proceedings culminated in the direct contract to pay. It was competent for the railroad company to take that action, and thereby bind themselves and successors. (*St. Mary's Church v. Cagger*, 6 *Barb.* 576. *Moss v. Rossie Lead Co.*, 5 *Hill*, 137. *Moss v. McCullough*, 7 *Barb.* 279. *Peterson v. City of N. Y.*, 17 *N. Y. Rep.* 449. *Dunn v. Rector of St. Andrew's*, 14 *John.* 118. *Danforth v. S. Turnpike Co.*, 12 *id.* 227. *Patterson v. Bank of U. S.*, 7 *Cranch*, 297, 307. *Buffalo Com. Bank v. Kortright*, 22 *Wend.* 348.) 10. The by-laws of the railroad company avow that the company was formed to operate the grant, and from that the company infer that there never was a sale of it by the grantees to the company.

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We answer : 1. The grant was property. It has been so held by this court. (15 Barb. 214, and cases before cited.) 2. It was valuable as property to the company, and to the grantees. The suit with the city shows that it was worth at least \$50,000 to the company, besides its value as a monopoly. The prices paid among the grantees and their assignees, show that it was regarded by the grantees as worth, at least, \$160,000. The company, over and over again, recognized it as of value. (3.) Yet nothing has ever been paid to the grantees. No stock was ever taken by, or given to, the grantees, but what they paid for. (4.) The averment in the by-laws is not inconsistent with the idea that the company were to pay for the grant which they were to operate, and does not, by necessary implication, establish a gift of the grant. (5.) The story is a simple one. Nine persons were owners of a grant, supposed to be very valuable. They wanted a company organized to operate the grant. They organized a company for that purpose, in which persons were to be interested in the proportions they contributed. They took stock themselves, and paid for all they took. And they expected all the parties in interest, including themselves, that is, all the stockholders, to pay for the grant. From the beginning to the end of the proceedings, there is nothing inconsistent with this view, but everything is consistent with it. 2. The certified copy resolution in our possession, and Attwood's report, the appointment of a commission, and O'Brien's propositions. Under these circumstances the question occurs, Is this a gift or a grant by us ? A gift is always gratuitous. A grant is always for some consideration or equivalent. A gift must always be accompanied by immediate possession. If not, it is void. Here was no possession till 1855, and consequently, if a gift, could be revoked. Could these grantees, after the act of 1854, have revoked this gift, and themselves operated the grant to the exclusion of the company ? The act of 1854, page 324, § 3, confirms the grants, licences and resolutions under which the roads have been constructed.

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This road had been constructed entirely under this grant, and it was this grant that was confirmed. To whom? To those to whom it belonged; and it belonged to the company when paid for.

V. The fifth objection made by the defendants to a recovery is, that our assignment of the grant was without consideration, and void.

We answer: 1. The assignment is under seal, and imports a consideration. (2 *B. S.* 406, § 77. 2 *N. Y. Stat. at large*, 423, § 77, *note*.)

2. The assignment expresses a consideration of \$200,000. By accepting it, the defendants admit a consideration. (*Maigley v. Hauer*, 7 *John*. 342.) Evidence of another consideration excluded. (*Jackson v. McChesney*, 7 *Cowen*, 361.) The paper is *prima facie* evidence of consideration and its payment. (*Thalhimer v. Brinckerhoff*, 6 *Cowen*, 102, *S. P.*)

3. While thus it was open to the defendants to prove no consideration, they have given no such evidence, and therefore our *prima facie* evidence becomes conclusive.

4. By accepting and working under the grant, as thus assigned to them, the defendants have ratified it, as a sale to them for a valuable consideration, of that which was of intrinsic value, and not having paid for it, are now liable for the price. (*Moss v. Rossie Lead Co.* 5 *Hill*, 137. *Moss v. McCullogh*, 7 *Barb.* 279. *Peterson v. New York*, 17 *N. Y. Rep.* 449.)

LEONARD, J. The grant from the Mayor, &c. of New York to Denton Pearsall and others, for the perpetual right to run a railroad through the Second avenue for the transportation of passengers, was valuable; it was transferred by the grantees to the Second Avenue Railroad Company, an incorporation duly created; the company accepted and used the grant; the company set it up successfully as a defense to an action by the mayor, &c. of New York, to recover penalties for the non-payment of a license fee for each car, attempted to be imposed

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by the city ; and no consideration for such transfer has ever been paid.

The principle that trustees, directors and others, acting in a trust relation, cannot make valid contracts with themselves affecting the trust estate is well established, and clearly applicable here. The trustees cannot fix the price of the property of the trust estate which they take under the name of a purchase ; nor can they sell to the estate which they represent, and conclusively settle the price to be received. Where the trustees have bought or sold such property as it was necessary for the estate which they represented to buy or sell, at fair and reasonable prices, the transaction is not necessarily to be disturbed. But if the price is unreasonable, or unfair, or any fraud or advantage has been imposed or taken, courts are swift to hold the transaction void, or to open the contract so as to fix a proper compensation between the trustees and the estate which they represent, as upon the whole transaction may be just.

Applying these rules to the present case, it will be found that the grantees from the city corporation, being a majority of the trustees of the Second Avenue Railroad Company, undertook to settle the price at which the company should receive an assignment of the said grant from themselves. The resolutions, so far as they created any evidence in their own favor, were wholly nugatory and void. The company was organized with the expectation that the grant was to be transferred to it, and the assignment was executed pursuant to the plans of the promoters of the company. I do not think that the assignment can be called fraudulent or void. The action is to recover the consideration. It was not in the power of the trustees of the company to name the price for the transfer of the grant from themselves to the company. That is a question which must necessarily remain open. The consideration named in the transfer was not conclusive upon the company.

The defendants, insisting that the transaction is wholly

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void, have offered no proof as to the actual or proper valuation of the grant. They chose to submit the case without any proof on this subject, and the inquiry is now closed. I am unable to see that they are now entitled to any relief on the question of consideration or value.

On the question of the statute of limitations, the action of the whole board of trustees, during the time the grantees were members, contained sufficient acknowledgments in writing, signed by the defendants, to take the case out of the operation of the statute, if they possessed any validity. But the same reasons which prevent the trustees from fixing their own value upon the grant, operate to preclude any construction whereby a right of action can be given to themselves, or any prejudice created to the railroad company which will accrue in an advantage to themselves. Without the benefit of the resolutions of the company, passed while the grantees constituted a majority of the members of the board of trustees, and more than six years having elapsed since the cause of action accrued, there is no existing promise to revive the demand. The statute appears to be a conclusive bar.

The argument that this is an action upon a sealed instrument, and therefore is not barred until the lapse of twenty years, cannot be sustained. The action is to recover the price of property conveyed at an agreed or implied valuation. There is no breach of any agreement under seal, alleged or proven. The fact that the grant is assigned by an instrument under seal, has no bearing upon the action, in this respect.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

There is also an appeal from an order sending the case back to the referee, and allowing the defendant Sealey to put in an answer to the complaint, setting up a claim to a share of the money alleged to be due from the railroad company for the said grant, and directing the referee to proceed and

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ascertain the amount due to Sealey, and allowing him to enter judgment for such amount as may be reported to be due him. No judgment had been entered on the report. Sealey was the owner of a share of the price due for the grant. He had refused to join in the action, and had therefore, under the provisions of the Code, been made a party defendant. He did not thereby lose his demand. The relief granted appears to be within the discretionary power of the court, and the order should be affirmed with \$10 costs to the respondents.

If I am correct as to the statute of limitations, the disposition made of this order appears to be of little consequence.

I am for reversing the judgment, ordering a new trial before the same referee, with costs to abide the event; and also for affirming the order allowing the assessment of damages due to Sealey, &c. with \$10 costs against the appellants.

INGRAHAM, J. I concur as to the statute of limitations. I am also of the opinion that the owners of the grant from the city, having formed themselves into a corporation and invited others to come in as stockholders and assist in erecting and building the road on the line of this grant, and having held out the idea that the corporation owned the right to the road, cannot take as directors, to themselves as the owners of the grant, the whole capital stock for the privilege obtained from the city.

If they had a right to vote any compensation therefor to themselves, they had the right to fix the price. Such a mode of disposing of the whole capital stock, by the grantees from the city, as directors, to themselves as individuals, ought not to be sustained. They received the benefit of the grant as stockholders, and if they invite others to take stock and put themselves in as directors, I can see no equity in allowing them to take the capital of the company to their own use merely because they are directors and form a majority of the board.

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There never was any sale agreed on. The subsequent transfer was only preparatory to passing the resolutions to pay themselves, and none of them should have the effect of making a contract, or of creating admissions to avoid the statute of limitations.

I concur in reversing the judgment.

SUTHERLAND, J. concurred.

Judgment reversed, and order affirmed.

[NEW YORK GENERAL TERM, April 1, 1867. *Leonard, Sutherland and Ingraham*, Justices.]

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HAY vs. LEIGH and others.

By the terms of a contract between the parties, the plaintiff sold, and the defendants purchased, "two boat loads western mixed corn in B.'s stores, Clinton wharf, ex boats Spencer and Galt, at 89 cents per bush. of 56 lbs., in store No. 1, bins 3, 4 and 5." Six boat loads of corn of the same quality and description had been placed and mixed together, in those bins, previous to the sale, four of which had been sold. It was proved that it was customary, in selling by the boat load, to designate the boats from which the corn was received into the store, for the purpose of fixing the quantity; that corn from each boat was weighed when received, and mixed with other corn of the same quality, and the name of each boat, and the quantity it contained, was marked upon the bins; so that in selling a specific boat load, the quantity and quality only were represented, and not the identity of the corn brought by such boats. The sale was by sample, taken from these bins, and the bulk in the bins was inspected by the defendants' agents, compared with the samples, and found satisfactory. The bins 3, 4 and 5, when filled with the six boat loads, had burst, on one side, and about one hundred bushels of the corn had fallen into the passage way, whence it was removed, temporarily, to the front side of another bin, in the rear of which was some other corn; the two parcels being separated by a partition, and not coming in contact with each other. The same identical corn so removed was afterwards returned to the bins from which it had been taken.

*Held* 1. That although the defendants purchased by sample from the bulk of corn in the bins, 3, 4 and 5, they had not purchased the identical corn taken

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into the bins from the boats Spencer and Galt. That the words "ex boats Spencer and Galt," were not necessarily, in the light of the evidence, a guaranty that the corn was taken from those boats.

2. That there being no means of determining from the face of the broker's bought and sold notes that these words indicated the quantity or quality of the corn, there was, in this respect, a latent ambiguity, and evidence was properly received in explanation.
3. That the judge was correct in refusing to charge that the defendants had purchased some particular boat load of corn, or that the contract did not mean the quantity and quality of corn brought by the particular boats.
4. That there being no proof that other corn was mixed with that sold, the testimony did not warrant the submission by the judge of the proposition that the defendants had purchased a specified bulk of corn in certain bins, and if other corn was mixed with it, that the plaintiff could not recover.
5. That an instruction to the jury that the defendants were bound to receive the corn if it were of the same quality and quantity with that contained in the boats Spencer and Galt, and that it was not material that it was not in the bins 3, 4 and 5 at the time of the contract, was not to be understood as an instruction that upon a sale of a particular article, another, of the same quality and quantity, must be received in fulfillment of the contract, if tendered for that purpose. That such a rule could not be sustained, although it might be impossible to appreciate, in damages, the actual difference.
6. That the plaintiff having tendered the corn, by offering to transfer the storage receipt therefor, there was no ground for the pretense that the offer to deliver was not of the same corn which was sold, as understood and intended by both parties.

**A**PPEAL by the defendants from a judgment entered upon the verdict of a jury. The plaintiff, on 24th March, 1863, through a broker, sold to the defendants two boat loads western mixed corn in Barber's stores, Clinton wharf, *ex Spencer and Galt*, at eighty-nine cents per bushel in store No. 1, bins 3, 4, 5. The corn was parcel of 118,000 bushels purchased by the plaintiff from Dows & Co. in December, 1862, embracing twenty different boat loads, and contained in twelve bins in Barber's stores. The bins in question (3, 4, 5) contained the cargoes of six boats, viz. the *Van Buren*, *Spencer*, *Galt*, *Elmer*, *Dayton* and *Eltes*. These different boat loads of corn were of the same quality and kind, and, according to the custom and usage, were placed in the bins 3, 4 and 5, which

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were thrown into one bin by taking down the moveable partitions. When the boats discharge their cargoes into the warehouse they are measured, and the name of the boat and the number of bushels entered in a book, and the names of the boats chalked on the front of the bins, and a receipt given specifying the names of the boats and the number of bushels. Sales of corn are always made by sample. The names of the boats are referred to, to designate the quantity of corn sold, which is ascertained by a reference to the warehouse register. When a sale is made, the storekeeper is notified, and he indorses the quantity on the original receipt, and issues to the purchaser a new receipt, and, unless it is removed, holds the corn thereafter for his account. To obviate repeated measuring and diminution by shrinkage or other natural causes, the warehouseman for a consideration guaranties the quantity, and the receipt so guarantied is used and transferred as one of the evidences of title. In the present case, the 118,000 bushels purchased from Dows & Co., although it consisted of twenty boat loads, and was in twelve bins, was all of the same quality, and was only kept separate for convenience. The bins 3, 4, 5, were thrown into one bin, and contained the loads of the six boats named. Samples had, from time to time, been taken, and sales made, and the names of the boats being referred to, to designate the quantities, there remained at the time of the contract on 24th March, 1863, only enough to correspond in quantity with the boat loads of the *Spencer* and *Galt*.

The making of the contract was proved by Hall the broker, and by the bought and sold notes produced by him on the trial. After the contract, the plaintiff made the usual delivery order on the warehouseman, who ascertained the quantity of corn in the boat loads mentioned in the contract, and which was 14,270½ bushels, and made a receipt stating that it was held subject to the order of the defendant, and this receipt was, with the bill, sent by the plaintiff to the defendants on the 25th of March, 1863, who refused to accept it.

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This was the customary and usual mode of delivering corn, and the fact was not contested on the trial. The complaint alleged, that after the defendants refused to receive the corn, the plaintiff, on due notice to the defendants, sold the corn at the Corn Exchange for eighty-six cents per bushel, which was the best price which could be had. That the net proceeds of the said sale, after deducting the usual and customary charges for brokerage, commission and weighing, amounted to the sum of \$12,058.33, leaving a deficiency of \$642.16 between the proceeds of said sale and the value of said corn at the contract price aforesaid, which sum, with interest and costs, the plaintiff claimed to recover.

The two points of defense raised on the trial were :

1. That the defendants were entitled to the identical bushels of corn which came on the boats *Spencer* and *Galt*.

2. That after the sale and before the tender, one hundred bushels of corn of inferior quality had been transferred from another bin to the bins named in the contract.

The jury found a verdict in favor of the plaintiff, for \$417.42; for which sum, with costs, judgment was rendered.

*G. Dean*, for the appellants.

*J. E. Burrill*, for the respondent.

*By the Court*, LEONARD, J. The counsel for the defendants requested the judge at the circuit to charge the jury that the defendants had purchased two boat loads of corn, arriving by two specified boats, stored in a particular place, and that they were entitled to have that identical corn; and that the contract did not mean the quantity and quality of corn brought by the said boats. (*See requests 1 and 2.*) He was also requested to charge that the sale was by sample from specific corn, and, if the testimony of certain witnesses was true, that other corn was mixed with that from which the sample was taken, after the sale to the defendants, and

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before the time of the tender of the corn, that they were not bound to comply with the plaintiff's demand of payment. Also that the defendants had purchased a specified bulk of corn in certain bins, and if other corn was mixed with it, that the plaintiff could not recover. (*See 5th and 6th requests.*) The above is a substantial statement of the requests made to the judge, which he refused to charge, and to such refusal the defendants' counsel duly excepted.

By the terms of the contract the plaintiff sold and the defendants purchased, "two boat loads western mixed corn, in Barber's stores, Clinton wharf ex boats *Spencer* and *Galt*, at 89 cents per bush. of 56 lbs. in store No. 1, bins 3, 4 and 5." It appeared from the evidence that six boat loads of corn of the same quality and description had been placed and mixed together in those bins some months before the sale, and that the defendants knew it. It was also in evidence that it was customary, in selling by the boat load, to designate the boats from which the corn was received into the store, for the purpose of fixing the quantity. That corn from each boat was weighed at the time it was received, and mixed with other corn of the same quality, and the name of each boat, and the quantity it contained, was marked upon the bins: so that in selling a specific boat load under such circumstances, the quantity and quality only were represented, and not the identity of the corn brought by such boats. Four of the six boat-loads originally contained in bins 3, 4, and 5, had been sold and delivered prior to the sale to these defendants.

The sale was by sample taken from these bins, and the bulk in the bins was inspected by the defendants' agents, compared with the samples, and found satisfactory.

While the defendants' agents were inspecting the corn, they saw some corn taken from another bin in the same store and put into bins 3, 4 and 5, with the corn there stored. It appeared that there was a large quantity of corn at the farther part of the bin from which the removal was being made

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which had been heated and was of an inferior quality to that in bins 3, 4 and 5. The defendants relied upon this evidence to show a mixing, either fraudulent or accidental, of inferior corn with that sold to them. It was however fully explained by uncontradicted evidence, wholly consistent and in harmony with the facts relied on by the defendants to show the injurious mixing. The bins 3, 4 and 5, when filled with the six boat loads, had burst the planks on one side, and a portion of the corn, about 100 bushels, had fallen into the passage way, from whence it had been removed to another bin, (No. 7,) then only partly occupied, with other corn, and piled separately until the broken bins were repaired. The same identical corn so removed was returned to the bins from whence it was taken; and it is probable that the defendants' agents saw the laborers engaged in placing it. The evidence is positive, and not contradicted, that it was the same corn which had been removed, and none other, which was again put into the bins 3, 4 and 5. It was undoubtedly true that the defendants had purchased by sample from the bulk of corn in the bins 3, 4 and 5, but not the identical corn taken into the bins from the boats *Spencer* and *Galt*.

The words "ex boats *Spencer* and *Galt*," were not necessarily, in the light of this evidence, a guaranty that the corn was taken from those boats. There were no means of determining from the face of the broker's bought and sold notes, that these words indicated the quantity or quality of the corn. In this respect, there was a latent ambiguity, and evidence was very properly received in explanation. It is made entirely certain that those two boat loads were not stored by themselves in the three bins mentioned, and that the parties understood the transaction as a sale by sample; the reference to the boats, and the locality where the corn was stored, being for the purpose of fixing the quantity, and further qualifying the legal effect of the exhibition of the sample. A certain time is allowed by custom, for inspecting the bulk of corn sold, and if the purchaser finds it not to

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compare satisfactorily with the sample, he is at liberty to retire from the sale, notwithstanding the delivery of the bought and sold note of the broker.

It appears to me entirely clear that the judge was correct in refusing to charge that the defendants had purchased some particular boat loads of corn, or that the contract did not mean the quantity and quality of corn brought by the particular boats, as requested by the first and second propositions submitted by the defendants.

The testimony did not warrant the submission by the judge of the other propositions now under consideration, (*5th and 6th requests.*) There was no testimony that other corn was mixed with that sold. There was evidence which, if not explained, would warrant that conclusion; but the explanation was given; and it was wholly inconsistent with the facts introduced in evidence to establish the conclusion insisted on by the request, and was not contradicted by any other evidence. The judge could not be required to assume or submit an hypothesis which had been proven to have no foundation in fact. Both of these latter requests contain the unsupported hypothesis that there was evidence to be submitted to the jury that corn of an inferior quality had been mixed with that sold by sample, after that sale had been made.

The judge instructed the jury that the defendants were bound to receive the corn if it were of the same quality and quantity with that contained in the *Spencer and Galt*, and that it was not material that it was not in the bins 3, 4 and 5, at the time of the contract.

This is not to be understood as an instruction, that upon a sale of a particular article, another of the same quality and quantity must be received in fulfillment of the contract, if tendered for that purpose. Such a rule could not, I think, be sustained; although it might be impossible to appreciate, in damages, the actual difference. Such a delivery would not strictly hold the rule of good faith to the purchaser.

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In this case, there is no ground for a just pretense that the offer to deliver was not for the same corn which was sold, as understood and intended, by both parties. The seller did not know that any of it had been, even temporarily, removed. The effect of restoring the corn to the original bins was to preserve the quantity sold. Had it not been replaced, the quantity would have been less than the two boat loads designated. The quality was also identical. It was indeed part and parcel of the article agreed and understood to be sold. The instruction has reference to the fact that corn, the cargo of six boats, of the same kind and quality, had been stored together in those bins, and that the contract called only for the corn there stored of the quantity and quality of that from the *Galt* and *Spencer*, and to the temporary removal of a portion of it from the said bins. The instruction was applicable to the facts as they actually existed, and had no tendency to mislead the jury. Any error of the jury, in this respect, was prevented by the instruction given by the judge, that if the one hundred bushels were of inferior quality, the defendants were not required to take it.

The judge was requested, but refused, to charge that the notice of sale was premature ; that it was invalid, because the sale was not public ; that the tender of the corn was insufficient, because the sum demanded in payment included alleged charges for weighing ; that the sale was not on the defendants' account, because notice was not given of the time, manner and place of sale, and because the sale was for cash up ; that the rule of damage is the difference between the contract price and the market value, including only one charge for weighing.

The notice of sale is not furnished. It is alleged in the complaint that due notice was given, and the allegation is not denied by the answer. It is to be held that the notice was sufficient.

The tender of the corn was by an offer to transfer the storage receipt. The bulk of the article precluded a manual

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delivery. The evidence shows that the price obtained on the sale made for the defendants' account, was as favorable as ruled on the day of sale, at the Corn Exchange. The tender, manner of sale, and the rule of damages, appear to be the same as that adopted and sanctioned by the Court of Appeals, in *Pollen v. Le Roy*, (30 N. Y. Rep. 549.)

The verdict was for \$417.42, being at a rate a trifle less than three cents per bushel. The contract price was eighty-nine cents, and the price obtained on the sale for the account of the defendants' was eighty-six cents per bushel—a loss of three cents. The account of the damage, as made up and demanded of the plaintiffs, does not appear in the case. It is quite evident that the jury did not adopt the rule claimed by the plaintiff given to them by the court. Either rule would produce a larger verdict. The rule given by the court was the difference between the purchase price, and the price which he could procure on the day of the sale. Whether the plaintiff demanded any thing for the expenses of weighing the corn, I find nothing in the case to enable me to decide. No reference to testimony on the subject has been given. It appears by the case in 30 N. Y. Rep. that the expenses of a resale was a proper item of damage. The recovery being less than the damage proven, arising from the fall in price, I think the defendants can have sustained no injury from the refusal to charge the rule of damage precisely as requested. The verdict is for a less sum than the difference between the purchase price and the market price on the day of sale, and includes nothing for expenses. A motion for a new trial was denied at special term.

The judgment and order should be affirmed, with costs.

[NEW YORK GENERAL TERM, April 1, 1867. *Leonard, J. F. Barnard and Ingraham, Justices.*]

WILLIAMS *vs.* SHERMAN and KNAPP.

By a written agreement, dated November 29, 1862, the defendants agreed to sell to the plaintiff four hundred cords of white pine wood, to be delivered on or about the 1st of May, 1863, and that no part of the delivery should be later than November 1, 1863, the same to be paid for, cash on delivery. The plaintiff agreed to pay for two hundred cords at the rate of \$5.25 per cord, and for the other two hundred cords at \$5 per cord. About one hundred and fifty-five cords were delivered, under this contract, and payments made therefor to the amount of \$788, between August 1 and September 1, 1863, when the defendants refused to deliver any more.

*Held* 1. That the contract was for the delivery of, and payment for, four hundred cords of wood as an entirety, half the quantity being at the higher, and half at the lower price.

2. That the contract was to the effect that the defendants would deliver, on or about May 1, and that no part of the delivery should be later than the 1st of November; the payment to be cash on delivery.

3. That the agreement was not for payment *as* the wood was delivered, but required the full performance of the delivery agreed on, before payment could be demanded.

4. That the contract gave the defendants the whole season, from May 1st to November 1st to deliver the wood; and if it was delivered within that time the plaintiff was bound to accept and pay for it.

5. That it was not the one half, or the other, that was to be paid for at the greatest price; but the prices named covered the whole quantity.

6. That the plaintiff committed no breach of his contract by refusing to pay any more than \$5 per cord, because the defendants were not in a condition to demand any thing; nor could such refusal be deemed a refusal to take any wood and pay for any part at the higher rate named in the contract.

7. That the judge erred in holding that the delivery of one hundred and fifty-five cords was too late to be applied on account of the two hundred cords which was to have been delivered on or about May 1st; and also in leaving it to the jury to say whether the delivery was in season, and if not, that the defendants were entitled to be allowed only at the rate of \$5 per cord.

8. That the plaintiff having accepted the one hundred and fifty-five cords as a delivery under the contract, the jury should have been instructed, in estimating the damages, to allow the defendants for one half of the wood at the larger price, and the remainder at the lower price.

THIS action was brought upon a contract made by the defendant with the plaintiff, to deliver to him four hundred cords of white pine wood. The contract is as follows :

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“NEW YORK, Nov. 29, 1862.

This is to certify that the party of the first part, Sherman & Knapp, have this day agreed to sell John T. Williams, the party of the second part, four hundred cords white pine wood, cut large size, four foot long, sticks not less than three inches up to eight inches, the said wood to be delivered on or about the first of May, 1863. The said John T. Williams agrees to pay for 200 cords at the rate of \$5½ per cord; the other 200 at \$5 per cord; the same to be paid for, cash on delivery, and the said wood to be delivered on or before the first of November, 1863; the same wood to be good merchantable wood.

JOHN T. WILLIAMS,

SHERMAN & KNAPP.”

The defendants delivered one hundred and fifty-five cords of wood on this contract, between August 1st and September 1st. Upon these deliveries the plaintiff paid to the defendants \$788.37. During the summer the price of white pine wood rose in the market from \$7.50 about \$5 per cord, which was the market price on the 1st of November. The defendants refused to deliver any more wood on the contract, and this action was brought for the non-delivery of the remaining two hundred and forty-five cords. The defense set up was the plaintiff's neglect to pay cash for the wood on delivery, and a notice by the plaintiff to the defendants that he would not receive any more wood on the contract.

The jury found for the plaintiff \$432.58.

*C. W. Sanford*, for the plaintiff. I. The question as to the performance of the contract was fully and fairly submitted to the jury, and their verdict is conclusive. Whether a sale has been completed is a question of fact for the jury. (*De Ridder v. McNight*, 13 *John*. 294.)

II. It is a well settled principle of law, as well as of morals, that a man, when he agrees to sell an article at a specified price, and by a specified time, cannot demand pay until he has fully performed the agreement on his part. (*Champlin*

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v. *Rowley*, 18 *Wend.* 187. *Stephens v. Beard*, 4 *id.* 604. *Dana v. Fiedler*, 1 *E. D. Smith*, 463; affirmed 2 *Kern.* 40.)

III. The seller's refusal to deliver renders it unnecessary that the buyer should tender the price, in order to entitle himself to sue for damages for non-delivery. (*Dana v. Fiedler*, *supra*.)

IV. The judge gave the true construction of the contract, that two hundred cords of wood were to be delivered on or about the 1st of May, and two hundred cords on or before the 1st of November.

V. The rule of damages, on a breach of special contract for the delivery of merchandise, (where the consideration is not payable before delivery,) is the difference between the market value of the article on the day it should have been delivered and the price which the plaintiff agreed to pay for it. (*Dana v. Fiedler*, 1 *E. D. Smith*, 463. *Sedg. on Dam.* 2d ed. p. 260.)

*T. R. Westbrook*, for the defendants. I. The judge erred in deciding that the contract required *two* hundred cords of wood to be delivered on or about the 1st of *May*, and that the wood delivered, in consequence of the late period of the delivery could not apply on the first two hundred cords, and was therefore properly paid for at *five* dollars the cord. The learned judge, it will be seen, makes the time of delivery of the essence of the contract, though wood had not fallen in price, between May 1st and the time of actual delivery, and although as Mr. Story, in section 310 of his work on sales, says: "Time is not, however, ordinarily deemed to go to the essence of a contract, unless it is so created by the parties, or unless it naturally follows from the circumstances of the case." 1. This is not the true construction of the contract. The contract does not require *two* hundred cords to be delivered by the 1st of *May*; if it requires any to be delivered by that time, it requires the entire four hundred to be delivered; for immediately after speaking of the "four hundred

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cords," it says "the said wood to be delivered on or about the 1st of May, 1863." Neither does the other date specified in the contract, "on or before the 1st of November, 1863," refer to the other two hundred cords, but to the entire four hundred. This is evident from the following considerations: The language is, "the same to be paid for cash on delivery, and the said wood to be delivered on or before the first of November, 1863, the same wood to be good merchantable wood." If the terms "same" and "said" refer to the last two hundred cords, and not to the entire four hundred cords, then you have no time of payment specified for the first two hundred cords, and no specification nor restriction as to its quality. But again, it is the "said wood" which is to be delivered on or before the 1st of November, 1863, and not the said two hundred cords. When a contract is an entirety, as this is for a quantity of wood, an expression, the "said wood" would, without words of limitation, refer to the whole; it is especially so here, because the word "wood" is nowhere, prior to this clause, used in the contract, except in connection with the four hundred cords, and the antecedent, therefore, to which the word "said" refers, the word "wood," is the entire four hundred cords. The court is also referred to the complaint, from reading which it is manifest that both expressions, to wit, "1st of May," and "1st of November," are applicable to the entire four hundred cords, and that neither can be referred to only a part of the wood. If then, as we have endeavored to show, the expressions used in the contract "1st of May, 1863," and "1st of November, 1863," refer to the entire four hundred cords, then the construction of the judge, which refers the former to the first two hundred cords, and the latter to the remaining two hundred cords, cannot be correct. What then is the true construction of the contract? To obtain this we must "place ourselves in the situation of the contracting parties whose language we are called upon to ascertain." (*Per Gridley, J. in Hasbrouck v. Paddock*, 1 Barb. 638.) What was that situa-

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tion? The contract was made November 29, 1862, after navigation closed, and the 1st of May following was about the time when navigation would open. The wood which was to be delivered lay upon the bank of the Delaware and Hudson canal, distant twenty miles from tide water. To give the contract a construction which would require the defendant to haul it with teams that distance would be absurd. It is clear, then, the parties intended that the delivery of the wood should begin "on or about the 1st of May, 1863," and terminate "on or before the 1st of November, 1863." This construction not only gives the words "May" and "November" force as applicable to the whole four hundred cords, which the contract requires, but gives significance and meaning to the words "on or about" preceding the words "1st of May," and the words "on or before" preceding the words "the 1st of November." The former being especially applicable to a date fixed for the commencement of the contract, and the latter for its completion. The parties also so construed the contract; for the first wood, though delivered August 4, 1863, was paid for at five dollars and a quarter per cord, and the letter of the plaintiff of June 27, 1863, reads: "I now notify you, that I am ready to receive the four hundred cords of wood that I contracted for with you last fall, to be delivered *between* the first of May and November." 2. If, as the judge held, the contract as written required two hundred cords to be delivered "on or about the 1st of May, 1863," it was perfectly competent for Williams to extend the time, which he did. (1.) His letter of June 27, 1863, had that effect. By it we were informed that the contract required the "four hundred cords" to be delivered between the 1st of May and 1st of November," and that if the same were "not forthcoming according to contract," (meaning thereby, of course, according to its terms as claimed by him,) he would hold the defendants responsible. It needs no argument to prove that if one party be required by another to do something in a certain way, such requirement

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amounts to a permission so to do it. And in this case the plaintiff having required us to deliver the whole four hundred cords "between the 1st of May and November" we had that whole period "between" those dates to comply with the contract. (2.) By accepting the wood on the 4th of August, 1863, as a delivery of the first two hundred cords, this point seems to require no elucidation. The principle upon which it depends has been frequently applied to cases of landlord and tenant. Thus, when in consequence of non-payment of rent, the tenant has incurred a forfeiture, a subsequent acceptance of rent by the landlord waives the forfeiture. In *Merrill v. The Ithaca and Owego Railroad Company*, (16 *Wend.* 586,) it was applied to the case of a written contract; the court deciding that "when work done under a special contract is not completed within the time limited for its performance, but is progressed in after the day with the assent of the party for whom the work is done, a recovery may be had \* \* \* according to the rate of compensation fixed by the contract." And the remark which Judge Cowen makes on page, 589, to wit: "If one party by his conduct or silence leads another to believe that he is at work for him on certain wages, he is estopped and shall not add to his demand," is applicable here. If Williams meant to insist that we were too late to deliver the two hundred cords, he should have told us so; by not telling us this, but on the contrary by accepting our cargo, and thus leading us to suppose that we could still deliver it "at certain wages" (prices) "he is estopped" from setting up that the wood subsequently delivered was not to be paid for at those prices.

II. The judge was equally wrong in the second reason which he gave for refusing to nonsuit, and which error was repeated in his charge in these words: "I say to you without hesitation, upon the face of this contract, that it was obligatory on the defendants to deliver the whole quantity of 200 cords, on or about the 1st of May, before they could demand of the plaintiff pay for any part of it." 1. The plaintiff had

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declared upon no such contract. The complaint set out one which required payment for each lot as delivered. At folio 4 in complaint the various lots delivered are set out, and this language is used: "Amounting in all to 155 cords of wood, for which said defendants were paid according to said contract by said plaintiff." Thus clearly recognizing the obligation to pay for the various lots as delivered. 2. Neither is the proposition sound on the merits. The contract called for "cash on delivery," *i. e.* as fast as delivered. In *Gardner v. Clark*, (21 *N. Y. Rep.* 400,) which was an action "for damages from the non-performance of a contract to sell and deliver a thousand bushels of barley at forty-four cents per bushel \* \* \* to be paid for as fast as it should be delivered," the court held that the barley should be paid for as each load was delivered. If the construction of the language is doubtful, the conduct of the parties under it may be referred to in aid of the construction. The defendants claimed, and this claim the plaintiffs conceded, that each load should be paid for as delivered. Upon this point there was no dispute, and the quarrel was only as to the amount to be paid. 3. But the point is of no consequence, as the plaintiff told us both by action and words that he would only pay five dollars the cord for the last two loads. We had a right to take the plaintiff at his word. If he informed us that he would pay a quarter of a dollar less per cord than the contract required, such information was a notice to us that he would not comply with the contract, and we had the right to terminate it.

III. It follows from the preceding propositions that the plaintiff should have been nonsuited. This proposition needs no argument. Assuming that the wood delivered was applicable upon the first two hundred cords, it was to be paid for at five dollars *and a quarter* per cord, and a refusal to do so was a violation of the contract by the plaintiff, which exonerated the defendants from a performance thereof. There can be no question that the first two hundred cords were to

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be paid for at five dollars and a quarter per cord. The contract, after making provision for the payment for "200 cords" at that price, says, "the other 200, \$5 per cord." That "200 cords" which is to be paid for at \$5 $\frac{1}{4}$ , is not only mentioned first in the agreement, but the remaining 200 cords is designated as the "other." In common parlance (and thus contracts are to be construed) that which is called the "other" is second.

IV. A very grave question also arises upon the whole case, growing out of the absence of any place named in the contract as the place of delivery of the wood. It was assumed on the trial that the defendants were bound to deliver the wood in New York city. The contract does not say so. "In a contract of sale, if no place of delivery be agreed upon, the articles sold must be delivered at the place where they are at the time of sale; unless some other place is required by the nature of the articles; or by the usage of trade; or the previous course of dealing between the parties; or is to be inferred from the general circumstances of the case." (*Story on Sales*, § 308.) No fact is shown upon the trial to regulate the delivery, except the conduct of the parties under it. And if this conduct points out the place of delivery, we respectfully submit it points out the time of it also, and likewise the manner of payment.

*By the Court*, LEONARD, J. The exceptions taken at the trial were ordered by the judge to be heard at the general term in the first instance, and proceedings were stayed in the meantime. The case now comes before the court on these exceptions.

The action is to recover damages for the non-delivery of wood sold by the defendants to the plaintiff under a written contract. The material parts of the contract, affecting the questions raised in the case, are to this effect:

Sherman & Knapp agree to sell to John T. Williams 400 cords of white pine wood to be delivered on or about the first

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of May, 1863. Williams agrees to pay for 200 cords at the rate of \$5.25 per cord ; the other 200 cords at \$5 per cord, cash on delivery ; the wood to be delivered on or before the first of November, 1863. This contract was signed by the parties, and bears date November 29, 1862. No question was made about the place of delivery, although none was named in the contract. About 155 cords were delivered under this contract, and payments were made therefor to the amount of \$788.

The delivery of wood and the payments were made between August 1 and September 1, 1863. The deliveries made were in three nearly equal parcels, from vessels at the wharf in New York city.

The judge held that the defendants undertook to deliver 200 cords about May 1, 1863, to be paid for when that amount should be so delivered, at \$5.25 per cord, and the other 200 cords were to be delivered about November 1, to be paid for when it was all delivered.

The defendants' counsel requested the judge to charge "that the plaintiff having on the reception of each cargo undertaken to pay the money, and the complaint alleging that the plaintiff paid according to the contract, the plaintiff cannot now say that he was not bound to pay for any wood until 200 cords were delivered."

The judge also held that the delivery of wood was too late to be applied on account of the 200 cords which the defendants agreed to deliver on or about the first of May, but he left it to the jury to say whether the delivery was in season for that purpose, and if not, that the defendants were entitled to be allowed for the wood delivered only at the rate of five dollars per cord. He also held that it was obligatory on the defendants to deliver the whole quantity of 200 cords, on or about May first, before they could demand pay for any part of it.

The defendants excepted to these rulings of the judge, and the questions so raised were argued at the general term.

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The contract appears to be for the delivery of, and payment for, 400 cords of wood as an entirety. Half the quantity was to be paid for at the higher, and half at the lower price. The defendants agreed to deliver it all on or about May 1st; but the other clause in relation to the delivery qualifies the former, and extends the time to the first of November. The contract is to the effect that the defendants will deliver on or about May 1st, and no part of the delivery shall be later than the first of November. The payment is to be "cash on delivery." The agreement is not for payment as the wood is delivered, but requires the full performance of the delivery agreed on, before payment can be demanded. The contract gave the defendants the whole season, from May 1st to November 1st, to deliver the wood, and if it was delivered within that time, the plaintiff was bound to accept and pay for it.

The defendants resided in Ulster county; the deliveries were by cargo from that county to the plaintiff at New York. The action of the parties indicates that the wood was expected to be delivered through the season of navigation. If any had been delivered within a reasonable time before the first of May, the plaintiff was required by his contract to pay for it. I am unable to perceive that it was the one half or the other, that was to be paid for at the greatest price. The prices named covered the whole quantity.

The direction that the defendants were only entitled to payment after the delivery of 200 cords, was not unfavorable to the defendants, inasmuch as they were not entitled to any payment till after the delivery of the whole 400 cords. Then the full price of \$5.25 for half and \$5 for the other half, per cord, was due, in case it was all delivered before November 1st, 1863.

The plaintiff committed no breach of his contract by refusing to pay any more than \$5 per cord, because the defendants were not in a condition to demand any thing. Nor can this refusal be considered, as the defendants insist, a refusal

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to take any wood and pay for any part at the higher rate named in the contract.

The judge was in error in holding that the delivery of 155 cords was too late to be applied on account of the 200 cords which was to have been delivered on or about May 1st, and also in leaving it to the jury to say whether the delivery was in season, and if not, that the defendants were entitled to be allowed only at the rate of five dollars per cord. The plaintiff accepted the 155 cords as a delivery under the contract, and in estimating the damages the jury should have been instructed to allow the defendants for one half of the wood at the larger price, and the remainder at the other price. This error may have affected the amount of damages, and the defendants are for that reason entitled to a new trial, with costs to abide the event.

[NEW YORK GENERAL TERM, April 1, 1867. *Leonard, Ingraham and Sutherland, Justices.*]

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DICKERSON and others vs. WASON and others.

Where, upon a trial at the circuit, the judge, after submitting questions of fact to the jury, directs that the exceptions be heard in the first instance at the general term, on the hearing at general term the court has nothing to do with the findings of fact; and even though erroneous it cannot interfere to correct them.

The judge at the circuit cannot direct a case to be reviewed and heard at the general term in the first instance, if there are questions of fact to be examined, so far as relates to such questions.

Where the judge submitted several questions to the jury, although he told them there was no conflict of evidence in the case, and gave as a reason why he could not decide the case as a matter of law that it was the province of the jury not only to determine as to the credibility of witnesses, where there was a conflict of evidence, but to determine the weight of circumstances as evidence; it was *held* that such a rule, if there was no conflict of evidence to call in question the credibility of witnesses, or to pass upon the weight of testimony, was clearly erroneous.

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**E**XCEPTIONS ordered to be heard at the general term, in the first instance.

*By the Court, INGRAHAM, J.* The judge, upon the trial, after submitting questions of fact to the jury, who found for the plaintiff, directed that the exceptions be heard in the first instance at the general term, and suspended judgment. It must be apparent therefore that on this hearing we have nothing to do with the findings of fact; and even if they were erroneous, we could not now interfere to correct them. In fact, the judge at the circuit cannot direct a case to be reserved and heard at the general term in the first instance if there are questions of fact to be examined. (*Cronk v. Canfield*, 31 Barb. 171. *Hoagland v. Miller*, 16 Abb. 103. *Lake v. Artisans' Bank*, 17 id. 232. *McBride v. The Farmers' Bank*, 26 N. Y. Rep. p. 450.) In the latter case, Selden J. says: "This cannot be done where any essential fact is left in actual doubt by the evidence." The general term, in this district, held that where the question arose on an exception to a dismissal of the complaint, and the exceptions were reserved for the general term, it was a mistrial. (*Hoagland v. Miller*, 16 Abb. p. 103.)

There is another class of cases where on the trial the case presents only questions of law, and the judge may direct a verdict subject to the opinion of the court at general term. That is not this case, nor can that be resorted to where there are any facts in dispute. (*Cobb v. Cornish*, 16 N. Y. Rep. 602. *Gilbert v. Beach*, Id. 608.)

In *Cobb v. Cornish*, Harris J. says: "Where the party desires to move for a new trial upon exceptions taken by him upon the trial, the judge may direct that the motion on the exceptions may be heard in the first instance at the general term."

In *Purchase v. Matteson*, (25 N. Y. Rep. 211,) Wright J. says: "There are but two cases where the general term can before judgment, and in the first instance, review the

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proceedings. One is, where the judge trying the cause directs the exceptions of the unsuccessful party to be heard in the first instance at the general term ; the other where there are no exceptions taken in the progress of the trial upon any questions of evidence, and the facts are uncontroverted." In the former case, the general term either grants a new trial or renders judgment. In the latter case, it renders final judgment in favor of either party who upon the conceded state of facts is entitled to it. In the present case, the judge submitted several questions to the jury, although he told the jury there was no conflict of evidence in the case, and gave as a reason why he could not decide this case as a matter of law, that it was the province of the jury not only to determine as to the credibility of witnesses, where there was a conflict of evidence, but to determine the weight of circumstances as evidence. Such a rule, if there is no conflict of evidence to call in question the credibility of witnesses, or to pass upon the weight of testimony, is clearly erroneous. It left to the jury to say that although there is no conflict of testimony, we do not give credit to the witnesses, or if the evidence is all on one side, we may determine as to the weight of the circumstances proved. Either was erroneous. If there was no such state of the testimony as called for the decision of these questions as facts in the cause, the judge should have decided the matter as one of law, and instructed the jury accordingly. If otherwise, he should have told them the facts were uncontroverted.

Upon the question of notice to the defendants, that the note was sent to Van Sams & Son as owners, or as the agents of the plaintiffs, the judge left it to the jury to determine the weight to be given to the circumstances proven. That evidence consisted of the letter inclosing the note, stating it to be for collection, and when paid asking them to remit proceeds by mail, and the evidence of one of the defendants as to the mode of keeping their accounts, and the indorsement on the note, that it was indorsed for collection. Whether this

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gave the defendants the requisite notice was a question of law, which should not have been submitted to a jury.

So also the judge submitted to the jury the question whether the advance of money by the defendants to Van Sams & Son, was from the course of dealings between them an advance upon this note in suit or not. That also was a question of law, and should have been decided by the court. There was no contradictory evidence, but a plain statement of the transaction, which left no fact in dispute.

We are told on the argument, that conceding these questions were improperly left to the jury, we can still see that the defendants had no right of complaint, and therefore should order a judgment on the verdict. But, I think, we have no such power at the general term. If the finding of facts by the jury is under an erroneous charge, we cannot, where the case is reserved merely for hearing the exceptions, ascertain the facts, or find what they are; that must be done by the jury, and if there are no facts in dispute, the judge at the circuit must so decide in the first instance. Any other rule would produce great confusion, and transfer to the general term the decision of questions of fact, and throw upon them the necessity of examining masses of testimony to ascertain the facts in a case, which should always be done by the court upon the trial.

Upon the trial it appeared in evidence that the draft was sent to the defendants by Van Sams & Son, with the information that it was sent by them for collection, and when paid to remit proceeds in draft on New York. It also appeared that the defendants were in the habit of making collections for Van Sams & Son, and did no other business with them, except to make collections; that they owed them no money except for collections, and that they were in the habit of remitting to them funds to make a balance sufficient to cover collections made by the defendants for them, and when they collected drafts they would advise Van Sams & Son, and credit them therefor. That often these collections were

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anticipated by money sent in advance. That this course of business continued after the receipt of the draft in controversy, and such remittances were made on the 17th and 20th of August, to an amount sufficient to cover this draft excepting a balance of five dollars eighty-two cents. That on the 27th August, when this draft was paid to the defendants, they credited Van Sams & Son with the amount, gave them notice thereof, and in the latter part of August Van Sams and Son sent a statement of the account between the parties showing the charge of the moneys received per their draft, and crediting the defendants with the amount advanced, claiming the balance of five dollars eighty-two cents. It was not until the 6th October following, that the defendants had any notice of the claim of the plaintiffs to the draft in controversy. The judge told the jury that the evidence was that the advances were made in accordance with a certain course of dealing which prevailed between the parties. That it was not necessary that the advance should be made specifically on this draft. That they might so find ; and then left it to the jury to find on this subject as they thought proper.

The case of *Clark v. The Merchants' Bank*, (2 Comst. 380,) is very similar in its principles to the present. Gardiner, J. says : " If the question was one of law arising upon facts undisputed, then the inference should have been drawn by the court, and the motion for a nonsuit will present it for consideration." After referring to the facts of the case, he says : " It would be a singular mode of transacting business to give credit for securities and allow the funds thus constituted to be drawn against, and the drawer at the same time to retain the legal or equitable interest in the securities." The only difference between that case and the one under consideration is, that in one case the party sending the paper for collection drew against it after it was sent, and in the other, the party receiving it for collection sent money, after the receipt of the draft, to be applied as a credit for it after it was collected. It makes no difference in the application of the principle of

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that case to this ; and, in the words of Judge Gardiner, "To hold that such drafts were transmitted for collection merely, with no right to a credit until they were actually paid, is to lose sight of the situation of these brokers, their business and its necessities." In *Warner v. Lee*, (6 N. Y. Rep. 144,) there was no advance made by the holder on the drafts received. If I am correct in the views I entertain as to the suspending judgment, the case is not regularly before us on appeal, but as we have heard the merits fully argued, and as we think there was error in the judge's charge, no good can come from sending the case back to have judgment entered, and then another appeal to be taken. It is better for all parties that a new trial should at once be ordered.

New trial ordered ; costs to abide the event.

[NEW YORK GENERAL TERM, April 1, 1867. *Leonard, Ingraham and Clarke, Justices.*]

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LEVI ANGEVINE and others, adm'rs, &c. appellants, vs. ANN ANGEVINE, respondent.

The amendment of section 399 of the Code making it applicable to surrogate's courts and proceedings therein, not only applied the provision allowing the examination of a married woman as a witness in her own behalf, on her application to the surrogate for letters of administration upon the estate of her deceased husband, but also the restriction on such examination ; so that if she came within that restriction she could not be examined in her own behalf, against administrators, to prove any transaction had with the decedent.

The term party to an action, which was used before the section was extended to proceedings in surrogates' courts must be construed as applicable to all proceedings to which the first part of that section is made applicable.

Where, on application to the surrogate for letters of administration, it appeared that an alleged marriage was celebrated by the husband under an assumed name ; was not consummated for five years thereafter, when the parties

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first cohabited together; and the husband had always lived apart from the wife until his death; and had not acknowledged the marriage, to his family; *Held* that upon these facts, in connection with newly discovered evidence that the husband was absent from the city at the time of the alleged marriage, justice to all parties required that the question of fact as to a marriage having taken place should be submitted to a jury.

**A**PPEAL from an order or decree of the surrogate of the county of New York, made on the 2d day of October, 1865, revoking letters of administration granted to the appellants herein on the 21st day of March, 1864, on the estate of Daniel Angevine, deceased; and decreeing letters of administration on said estate to the widow of said Daniel Angevine, who is the respondent herein. Daniel Angevine died on the 14th day of March, 1864, leaving him surviving the respondent who claimed to be his widow, and three children. The children at the time of his death were respectively aged eight, six, and three years old, who are his only next of kin, and heirs at law. It was claimed that Daniel Angevine was married to the respondent at the city of New York, December 16, 1849; the ceremony of marriage being performed by the Rev. Mr. Haven, a minister of the Methodist church. In connection with the present appeal, there was a motion to open the case, and take testimony newly discovered since the trial before the surrogate. Objection was made to the evidence of the respondent, in her own behalf, on the ground that she was not a competent witness, claiming against the estate by way of contract.

*Charles Cheney*, for the appellants.

*B. J. Blankman*, for the respondent.

*By the Court*, INGRAHAM, J. In this matter a motion is made to open the case and take testimony newly discovered since the trial before the surrogate.

I do not think we could order a new trial on such a ground solely, but as was done in the case of *Caujolle*s, (9 Abb. 393.)

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such evidence might be received on this appeal and considered in connection with it, if necessary.

The material question arises as to the propriety of admitting as a witness Ann Angevine in her own behalf to prove the marriage. This was objected to and an exception taken.

Since the amendment of the 399th section of the Code making it applicable to surrogates' courts and proceedings therein, it is immaterial whether she could have been a witness prior thereto or not. The application of that section to proceedings in surrogates' courts, not only applied the provision allowing her examination, but also the restriction on such examination, so that if she came within that restriction she could not be examined in her own behalf against administrators, in respect to any transaction had with the deceased person. The term party to an action, which was used before the section was extended to proceedings in surrogates' courts, must be construed as applicable to all proceedings, to which the first part of that section is made applicable.

Upon the questions of fact in this case there is great room for doubt. The alleged marriage to a person under a fictitious name; the admitted fact that such marriage was not consummated for five years thereafter, and that the parties then and not before cohabited together; the fact of his always living apart from the respondent until his death, and the want of recognition on his part to his family; are strong circumstances to throw doubt on this transaction. And when there is connected with them, the newly discovered evidence that the deceased was absent from the city at the time of the alleged marriage, it seems that justice to all parties would be better subserved by submitting such a question to a jury.

I do not think a review of the evidence, or of the contradictions in it, at this time advisable. If a new trial is to be had before a jury, such trial had better take place without any expression of opinion by the court as to many matters appearing in the testimony.

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Fairchild v. Liverpool and London Fire and Life Ins. Co.

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For the reasons above mentioned, as well as for the admission of the respondent as a witness to prove the marriage, I am of the opinion that the decree of the surrogate should be reversed, and a new trial ordered at the circuit, costs to abide the event.

[NEW YORK GENERAL TERM, April 1, 1867. *Leonard, Smith and Ingraham, Justices.*]

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FAIRCHILD *et al.* vs. THE LIVERPOOL AND LONDON FIRE  
AND LIFE INSURANCE COMPANY.

A policy of insurance against fire purported to cover "merchandise hazardous, not hazardous, and extra hazardous, their own or held by them in trust or on commission or joint account, &c. in all or any of the brick or stone warehouses, and while *in transitu*, or on any of the streets, yards or wharves in the cities of New York, Brooklyn or Jersey City, and unless under the protection of a marine policy, subject to average clause annexed." To this policy was annexed this provision: "It is at the same time agreed that if any specific parcel of goods included in the terms of this policy, or such goods in any specified building or buildings, place or places, within the limits of this insurance, shall, at the time of any fire, be insured in this or any other office, this policy shall not extend to cover the same, excepting only so far as relates to any excess of value beyond the amount of such specific insurance or insurances, which said excess is declared to be under the protection of this policy and subject to average as aforesaid."

The fire occurred at one of the places where the insured had merchandise, to the value of \$386,026. They had a specific insurance on the goods in that store to \$324,000. The loss and damage occasioned by the fire was \$274,192. In an action upon the policy, to recover of the insurers a *pro rata* amount of the loss in proportion to the amount insured;

*Held* that the true interpretation of the policy was that if a loss occurred, and the specific insurance exceeded the loss, the party insured was protected thereby, and had no claim under the general policy. That if the specific insurance fell short of the loss, the insured might recover on the general policy, for such excess.

*Held, also*, that the fact that the whole loss was covered by, and to be paid by, the specific insurance, established a defense, under the policy, that there was no loss chargeable thereon.

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THIS action is brought to recover on a policy of insurance against fire, which purports to cover "merchandise, hazardous, not hazardous and extra hazardous, their own or held by them in trust or on commission or joint account, &c. in all or any of the brick or stone warehouses, and while in transitu or on any of the streets, yards or wharves in the cities of New York, Brooklyn or Jersey City, and unless under the protection of a marine policy, subject to average clause annexed."

To this policy was annexed this provision: "It is at the same time agreed, that if any specified parcel of goods included in the terms of this policy, or such goods in any specified building or buildings, place or places, within the limits of this insurance, shall at the time of any fire, be insured in this or any other office, this policy shall not extend to cover the same, excepting only as far as relates to any excess of value beyond the amount of such specified insurance or insurances, which said excess is declared to be under the protection of this policy and subject to average as aforesaid."

The fire occurred at 146 Duane street, which was one of the places where the plaintiffs had merchandise to the value of \$386,026. The plaintiffs had a specific insurance on the goods in that store to \$324,000. The loss and damage occasioned by the fire was \$274,192.

The plaintiffs seek to recover from the defendants a *pro rata* amount of the loss in proportion to the amount insured. The defense is that the defendants are only liable for the amount of the loss sustained over and above the specific insurance.

Upon the trial of the cause the justice at special term dismissed the complaint, from which the plaintiffs appealed.

*Daniel Lord*, for the appellants.

*Samuel E. Lyon*, for the respondent.

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*By the Court,* INGRAHAM, J. The first question in this case is whether the policy in suit covers the same property as that of other policies. If it does not, then the rule as to *pro rata* payment between insurers where the loss is less than the amount insured does not apply. The specific policy covered all the merchandise in the store where the fire took place, and did not cover any other property.

The general policy of the defendants excepted from the benefits of that insurance all goods that were specifically insured, and limited the liability of the defendants to the excess of value beyond the amount of specific insurance.

I think it is clear that these policies do not cover the same property. The specific policy covers all the goods to the amount of \$324,000, and the general policy does not cover that amount at all, but only the excess over that amount. It is clear that the holders of the specific policy would have no right to claim any abatement from the loss on account of other insurances on the property as contained in their general policy, even if the amount insured had been much above the actual value of the property, because the policies do not cover the same property, and the clause in the policies on that subject does not apply.

The other question is whether the plaintiffs have sustained any loss in the property covered by this general policy for which they can recover; and the answer to that question depends on the answer to the question whether there is any liability for damage under the general policy until the amount of specific insurances is deducted from the loss, and a deficiency exists to make the plaintiffs good.

I think it must be conceded that the specific insurer is liable for the whole loss, in the present case. The amount of loss is less than the amount of the insurance. The property is not covered by any other policy, and, to the amount of loss, the plaintiff can claim under his policy, for indemnity. The specific policy covers all the property to a particular amount. The general policy does not cover that property,

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*Fairchild v. London and Liverpool Fire and Life Ins. Co.*

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but covers the excess to a particular sum, called the excess of value. How is that excess of value to be ascertained? By finding what is specifically insured, and deducting that from the whole value.

It seems to me the difficulty in the plaintiffs' case arises from the fact that there is no damage which they can claim under this policy. They can only claim for an actual loss. No such loss exists, because the specific insurance is more than enough to make good the loss, and the specific insurers are bound to do so. If after the settlement of those policies, any loss remains, it can be recovered. If there be no loss, I can see no liability of the defendants under the general policy.

It is worthy of remark that this general policy is not upon the excess of property over the specific insurance, but the excess of value above the amount of specific insurance. The specific insurance gives a fixed sum. The actual value of the merchandise gives a fixed sum. The general policy only covers the balance after deducting the whole amount of specific insurance, and I think only applies an indemnity where the loss exceeds the specific insurance.

The true interpretation of this policy seems to be, if a loss occurs, and the specific insurance exceeds the loss, the party insured is protected thereby and has no claim under the general policy. If the specific insurance fall short of the loss, the insured may recover on the general policy for such excess.

The questions raised are novel, and we have no adjudications on this subject to aid in its decision, but I think the fact that the whole loss is covered by, and to be paid by, the specific insurance, establishes a defense under the policy in question that there is no loss chargeable thereon.

The judgment should be affirmed, with costs.

[NEW YORK GENERAL TERM, April 1, 1867. *Leonard, Sutherland and Ingraham, Justices.*]

THE PEOPLE, *ex rel.* Emma Teed, *vs.* MARY TEED.

The affidavit by which summary proceedings for the removal of a tenant are initiated, need not state the date, or duration of the lease.

The facts stated in such affidavit, and not denied by the affidavit of the tenant, are admitted.

Where the facts put in issue are the ownership of the premises, and the hiring thereof to the tenant, proof of a conveyance to the landlord, and the payment of rent to him by the tenant, establishes both of these issues against the tenant.

If the nature of the hiring was such that the landlord could not take the remedy by summary proceedings, the tenant must set up that defense.

The statute requiring that upon summary proceedings an officer shall be sworn to keep the jury, &c. is directory in that respect; and though the return does not show that an officer was sworn, the court cannot infer that the jury were not kept by an officer, or that he was not sworn.

It being the duty of the magistrate to swear an officer, the intendment of the law, in the absence of proof to the contrary, is that he performed his duty.

THIS case came up upon a writ of *certiorari*, issued under the statutes regulating "summary proceedings to recover the possession of land," (2 R. S. 516, § 47,) to Frederick W. Loew, Esq. justice of the district court for the fifth judicial district of the city of New York, to review the proceedings and judgment before him, against Emma Teed, (the relator,) as tenant of the premises No. 345 Third street, in the city of New York.

In October, 1863, Oscar Teed, the husband of the relator, contracted to purchase the premises in question. He made the bargain for the property; employed a lawyer to search the title, and paid for the property with his own money. Mary Teed, the respondent, had nothing to do with the purchase, and knew nothing about it. But at the suggestion made by Oscar Teed to his lawyer, the name of Mary Teed, who was the mother of Oscar, was put into the deed as grantee. The deed was kept in *Oscar's exclusive possession* until his death in November, 1866. After Oscar's purchase of the house, he repaired it *with his own money* to the amount of \$1500. And in May, 1864, he entered into the occupation of it with his family, and continued to reside there until his

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death, in November, 1866. During all this period, Oscar Teed paid all the taxes on the house, and kept it insured in his own name. Mary Teed, the respondent, never acted in any way as owner of the premises, nor appeared upon the premises to make any claim as owner "until five days after her son Oscar died." Oscar Teed died intestate, leaving him surviving his widow Emma Teed, the relator, and several children. Five days after Oscar's death, Mary Teed, the respondent, first appeared on the premises, demanded the deed, and said she wanted \$30 a month rent for the future. The relator having refused to pay rent under a claim of title in the premises, an application was made on the 21st December, 1866, to Justice Leow, to remove her and her children, and under-tenant, from the premises, under the summary proceedings act. The jury having found in favor of the landlord, the relator brought a *certiorari* to review the proceedings before the justice.

*John S. Jenness*, for the relator.

*John Graham*, for the respondent.

LEONARD, J. The affidavit of the respondent, Mary Teed, states that she is the landlord; that Oscar Teed hired the premises, and promised to pay her \$22.50 per month, in advance, for the use and occupation. That on the 1st day of December, 1866, the sum of \$22.50 was due for one month's rent of the said premises for the said month. That Oscar is dead, leaving his wife, the said Emma, surviving; that she is his legal representative, and as such is in possession; that the rent has been demanded of the said Emma since it became due; that she has made default; and that the said Emma, as such legal representative, tenant, and one Leaycraft, under-tenant, hold over and continue in possession, without permission of the landlord, after default in the payment of the rent.

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The relator, Emma Teed, denied that Oscar Teed, as tenant, hired from the said Mary as landlord; she denied that Oscar was ever tenant, or the said Mary landlord of the premises. She denied that she was tenant of the said Mary. She denied that any agreement for hiring was ever entered into between the said Mary and herself or said Oscar. She stated that Oscar owned the premises in his life time; and that since his death, she and the children of the said Oscar were the owners, and are in possession.

At the trial the title was proven to be in Mary Teed by deed to her, and also that Oscar in his life time paid her rent; that when he paid money to Mary Teed, he said, "*there is my rent.*"

It is insisted by the relator, that the affidavit of Mary Teed is defective in not stating when the hiring was made, and the duration of the lease; and that these are facts essential to be set out, to give the justice jurisdiction of the proceeding.

The statute does not prescribe that the landlord shall state in the affidavit the date or duration of the lease. The facts constituting a tenancy are stated—ownership and hiring—the rent due, when it became payable, and for what period, are also stated. The facts put in evidence are the ownership and the hiring. The conveyance to Mary Teed, and the payment of rent by Oscar Teed, established both of these issues against the relator. If the nature of the hiring was such that the landlord could not take the remedy by summary proceedings, the tenant must set up that defense.

The same question was raised in *Norworthy v. Bryan*, (33 Barb. 153.) It was there insisted that the landlord should state the nature or duration of the tenancy. It was held that if the contract be not fully stated, the tenant should have supplied the defect, (p. 155.) The lease does not appear to be in writing. It continued till the following May, presumptively, in case the rent was punctually paid. (1 R. S. 741, § 1.) The facts stated in the affidavit of the landlord, and not denied by the affidavit of the tenant, are admitted.

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It is also objected that the return shows that the jury retired to deliberate upon their verdict, but does not show that an officer was sworn to keep the jury, &c.

The statute is directory in this respect. We cannot infer that the jury were not kept by an officer, or that he was not sworn. The relator might have procured a further return, if the magistrate did, in fact, neglect the performance of his duty, and the relator had desired to make it appear. It was the duty of the magistrate to swear an officer, and it is the intendment, in the absence of proof to the contrary, that he performed his duty. (*Hatch v. Mann*, 9 *Wend.* 262.)

The judgment and proceedings should be affirmed, with costs.

INGRAHAM, J. concurred.

SUTHERLAND, J. There can be no doubt that in a summary proceeding to recover the possession of premises, under the statute, the affidavit must show the tenant or lessee to be one at will or sufferance, or for a part of a year, or for one or more years. (*See* § 28, *of statute.*) And I dissent from so much of the within opinion as states or intimates to the contrary; but I concur in affirming the proceedings, on the ground of the local law. (3 *R. S.* 5th ed. 34, § 1.)

Judgment and proceedings affirmed.

[NEW YORK GENERAL TERM, April 1, 1867. *Ingraham*, *Leonard* and *Sutherland*, Justices.]

EDWARD SKILLEN *vs.* ADALINE A. RICHMOND and CHARLES  
W. VAN DOREN.

A promissory note, or bill, to come within the rules for the protection of the holders of mercantile paper, must be payable absolutely, at some future period, not depending on a contingency, nor payable out of a particular fund. An instrument was drawn in the usual form of a promissory note, except the following clause, viz: "Payable out of and from my separate property and estate, with interest payable quarterly." *Held* that the instrument was not affected by any of the above rules; the words used not referring to a particular fund, but to the whole estate of the maker. Individual promises are always payable from the separate estate of the maker.

*Held, also*, that whether the instrument was subject to the rules of law governing mercantile paper, or not, evidence to show an agreement, contemporaneous with the making or indorsement of the instrument, to extend the time of payment, was not admissible, in an action by the holder, against the maker and indorser. SUTHERLAND, J. dissented.

Neither a promissory note, nor any other agreement in writing, can be varied or impaired by parol evidence.

THIS action was brought upon an instrument alleged to be a promissory note, made by the defendant Richmond, and indorsed by the defendant Van Doren, and delivered to one Thomas Aitken; who afterwards, before maturity, delivered the same to the plaintiff. The instrument was as follows:

"\$2,500.

NEW YORK, Dec. 31st, 1863.

Twelve months after date, I promise to pay to the order of C. W. Van Doren, the sum of two thousand five hundred dollars, value received, payable out of and from my separate property and estate, with interest payable quarterly, value received."

(Signed,)

ADALINE A. RICHMOND.

(Endorsed,)

C. W. VAN DOREN.

The defendants, by their separate answers, denied the plaintiff's title as the lawful indorsee or holder of the said instrument, and alleged, as matter of defense, that Thomas Aitken was the real party in interest, and this action is prosecuted for his benefit; and that at the time of making, indorsing

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and delivering the said instrument, an agreement was made between all the parties to the transaction, by which, at the option of the defendants, an additional time of six months would be allowed to them, in which to pay the sum intended to be secured by the instrument set forth in the complaint. The defendants also set up a counter-claim, of which, however, no evidence was given, in consequence of the ruling of the court.

The action was tried before Justice CLERKE, without a jury, who found the facts to be as follows:

*First.* That the promissory note mentioned and set forth in the complaint was executed by Adaline A. Richmond and indorsed by Charles W. Van Doren, the defendants in this action, in pursuance and as part of the consideration of a written contract of sale, made between A. E. Aitken and Adaline A. Richmond, of the right, title and interest of said A. E. Aitken in and to the business of the firm of C. W. Van Doren & Co. of which firm both of the defendants and said A. E. Aitken were members, said note bearing even date with said contract, and being fully described therein and forming a part of the same transaction.

*Second.* That said note was by said A. E. Aitken duly indorsed and delivered to the plaintiff, before the maturity thereof and for value received.

*Third.* That there is due and owing to the plaintiff, by the defendants, upon said note the sum of two thousand five hundred dollars principal, one hundred and twenty-one dollars and twenty-six cents interest, and one dollar fees of protest, amounting in all to the sum of two thousand six hundred and twenty-two dollars and twenty-six cents.

Upon the facts thus found by the judge, his conclusions as to the law were as follows:

*First.* That the plaintiff is the lawful owner and holder of said promissory note.

*Second.* That the defendant could not set up want of consideration between the original parties to the note, to dis-

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charge them, or either of them, from their liability on said note to the plaintiff, a third party and a *bona fide* holder, who received the same for value before maturity.

*Third.* That judgment should be entered for the plaintiff against the defendants, for the sum of two thousand six hundred and twenty-two dollars and twenty-six cents, with costs, and an additional allowance of fifty dollars.

Judgment being entered accordingly, the defendants appealed.

*W. B. Ackley and Jas. F. Ridgeway*, for the appellants.

I. The instrument set forth in the complaint and proved on the trial is *not a promissory note*. The essential qualities of a note or bill, are that it be payable at all events, not dependent upon any contingency, *nor payable out of a particular fund, &c.* (*Cook v. Satterlee*, 6 Cowen, 108.) This instrument is an agreement to pay out of and from the separate property and estate, and not to pay absolutely. It is not by its terms payable from any estate held jointly with another. It does not, on its face, appear to be the note of a married woman, and therefore the words are not to be assumed to be an intent to charge her separate estate as a *feme covert*, but are to be read as if used by a single woman or a man. If the evidence outside of the note is to be considered, it appears that Adaline A. Richmond was jointly interested in the assets of the firm of C. W. Van Doren & Co. and it does not appear, nor is it alleged that she had any separate estate whatever.

And again, the instrument does not provide for the payment of a certain expressed sum at a certain time, but provides for payment of interest in installments. Upon its face it cannot be told when it would become due. There might, upon default in payment of interest, be several causes of action on the same instrument. It is submitted that the possibility of such results is entirely inconsistent with the legal character of a promissory note. The instrument in question

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is, therefore, nothing more than a special agreement to pay money, and is not to be treated as carrying with it, on its assignment, the privileges which attach to commercial or negotiable paper.

II. If the preceding point is well taken, then the plaintiff, if he has any title at all to the instrument in question, has that of an assignee of a chose in action, and not of an indorsee of mercantile paper, and is therefore affected by all the equities existing between the original parties. Therefore, the refusal of the justice, on the trial, to admit evidence as to the consideration to the defendant, Van Doren, for placing his name upon the instrument in question, was error. If the instrument was not a promissory note, but only a special contract, then the defendant Van Doren is merely a surety or guarantor, and it is competent for him to show that there was no consideration received by him. And it was also error, for the same reason, to refuse to admit evidence as to the agreement to extend the time of payment, as offered.

III. The case shows, and the facts are, that Mrs. Aitken, Mrs. Richmond, and Mr. Van Doren were copartners, by the name of C. W. Van Doren & Co. and that Mrs. Aitken sold her interest to Mrs. Richmond for \$2500, and agreed that the said value of her share should remain in the business, she receiving interest therefor, quarterly, the principal sum, however, to be paid at the end of a year. The defendants, however, allege that at the same time it was expressly agreed that at the option of the defendants, six months further time to pay the same should be allowed. Mrs. Aitken, in the meantime to receive the interest quarterly. This agreement, the defendants were not allowed to prove. The justice during the whole of the trial treated the instrument in question as a promissory note, and the plaintiff as a bona fide holder thereof before maturity, and therefore not to be affected by any of the evidence offered by the defense. But if the plaintiff is only an assignee of a special contract, evidence of such an

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agreement was clearly admissible, and it was error on the part of the justice to reject it.

IV. If the preceding points are not well taken, and the instrument in question is to be considered as a promissory note, then it is claimed that the plaintiff has failed to prove that he is the *bona fide* and lawful holder of the same. The plaintiff himself is not a witness. The only evidence as to the transfer of the note to the plaintiff, is that of Thomas Aitken, the husband of Mrs. Aitken. The instrument was, about a week before it was due, given to him by his wife "*for the purpose of raising money upon it.*" This was on the 25th December, 1864. On the *same day* (no bank day) he passes it to the plaintiff, *paying teller* in a bank, for \$100 in cash and check of \$2400 on the bank of which plaintiff is teller. The action was tried in June 8th, 1865; and the husband, who does his business in his wife's name, and wants to raise money, throws away \$43.75, one quarter's interest, gets only \$100 in cash, and does not know at the trial, nearly six months afterwards, whether the \$2400 check has been paid. It is obvious that the transfer of this instrument or alleged note was merely nominal, and not made in good faith; and that the plaintiff is not the real party in interest.

V. The plaintiff was allowed, upon the trial, to inquire into the circumstances under which this instrument was made, and the court permitted the plaintiff, under objection of the defendant's counsel, to prove an agreement to which the defendant, Van Doren, was not a party, and of which it is not shown that he had any notice whatever.

The defendant, Van Doren, cannot be charged with notice of the contents of that paper, simply because he was present when it was delivered. It does not appear that he ever heard of it, or knew of its execution. It was, therefore, error to allow the same in evidence as against him.

But it was equally error to refuse the admission of evidence on his part as to the circumstances and collateral agreement

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attending the transaction, after the plaintiff had been permitted to give evidence on his part in respect thereto.

VI. Whether the instrument in question be considered a special agreement or a promissory note, the defendants were not permitted on the trial of this action to prove their equitable defense, and there should be a new trial.

G. W. Wingate and H. C. Platt, for the respondent.  
 I. The bill of sale, fully describing the note in suit, as part consideration of the sale, was properly allowed in evidence to prove the original consideration, inasmuch as the defendants had set up a *failure of consideration* in their third defense. Its rejection as evidence would have had no material effect upon the case, as the defendants did not impeach the plaintiff's title to the note or prove that he had any notice of any agreement of renewal. The failure of consideration is no defense against an indorsee for value. (2 *Starkie on Evidence*, 170. 2 *Greenl. on Ev.* 184. *Perkins v. Challis*, 1 *N. H. Rep.* 254. *Waterman v. Barrett*, 4 *Harring.* 311.) As this evidence could not prejudice the defendants, or alter the result, its admission is no cause for a new trial. (*Crory v. Sprague*, 12 *Wend.* 41. *Beckman v. Platner*, 15 *Barb.* 550. *Woodruff v. McGrath*, 32 *N. Y. Rep.* 255. *Ashley v. Marshall*, 29 *id.* 503.)

II. The plaintiff was a *bona fide* holder for value, by *presumption of law*. It is a well settled rule that where a plaintiff introduces and proves a negotiable promissory note, payable to a third person, and, if to the order of such person, proves his indorsement thereof, the plaintiff is *prima facie* not only to be deemed the lawful owner of the note, but the presumption is that it came to him in the regular course of business before maturity. (*Vallett v. Parker*, 6 *Wend.* 615. *James v. Chalmers*, 2 *Seld.* 209. *Nelson v. Cowing*, 6 *Hill*, 336, 339. *Pinkerton v. Bailey*, 8 *Wend.* 600. 24 *How. Pr. R.* 64.) It is only where fraud, either in the in-

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ception of the note or in putting it in circulation, has been shown that the burden of proof is thrown on the plaintiff to show, the payment of value. (*Catlin v. Hansen*, 1 *Duer*, 323. *Hart v. Potter*, 4 *id.* 459. *Ross v. Bedell*, 5 *id.* 467.) In addition to this *presumption of law*, we have the positive testimony of the *defendants' own witness* (Aitkin) that the plaintiff was a *bona fide* holder for value before maturity. This cures any mistake in the ruling. (*Vallett v. Parker*, 6 *Wend.* 615.) And is a waiver of the defendants' exception. (*Jackson v. Tuttle*, 7 *Cowen*, 364.)

III. The *bona fide* holder of a bill by indorsement before maturity, takes it subject to no equities between his assignor and the promissor, which are not indicated on the face of the note. (*Hall v. Wilson*, 16 *Barb.* 548. *Fletcher v. Gushee*, 32 *Maine R.* 587. *Walker v. Davis*, 33 *id.* 516. *Gwynn v. Lee*, 9 *Gill*, 138. *Kohlman v. Ludwig*, 5 *Low. R.* 33. *Brown v. Davis*, 3 *T. R.* 82.) 1. No extrinsic evidence is admissible to vary the contract apparent on the bill, or to show that at the time of making the note, the plaintiff had agreed to take a renewal of the note in lieu of payment. (2 *Starkie on Ev.* 169. *Stackpole v. Arnold*, 11 *Mass. R.* 27. *See cases infra.*) 2. This rule of evidence has been long settled, The case of *Hoare et al. v. Graham et al.* (3 *Campbell*, 56,) is a case in point. The action was on a promissory note, by indorsee against maker and indorsers. Defense set up that at the time of the framing of the note, the defendants refused to indorse it, unless the plaintiffs would agree that it should be renewed when it became due; that the latter acceded to this condition, and that they afterwards demanded payment, instead of calling for a renewal. Lord Ellenborough said: "I don't think I can admit evidence of this sort. What is to become of bills of exchange and promissory notes, if they may be cut down by a secret agreement that they shall not be put in suit? The parol condition is quite inconsistent with the written instrument. The condition for a renewal entirely contradicts the instru-

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ment which the defendants have signed. Such an agreement rests in confidence and honor only, and is not an obligation of law. There may, after a bill is drawn, be a binding promise for a valuable consideration, to renew it when due, but if the promise is cotemporaneous with the drawing of the bill, the law will not enforce it. This would be incorporating into a written contract an incongruous parol condition, which is contrary to first principles. There must be a verdict for the plaintiffs." (*Erwin v. Saunders*, 1 Cowen, 249. *Frost v. Everett*, 5 id. 497. *Hunt v. Bloomer*, 5 Duer, 202.)

IV. A jury having been waived by oral consent in open court, the findings of the court on questions of fact upon evidence, are as conclusive as the verdict of a jury.

LEONARD, P. J. The action is for the recovery of a sum of money mentioned in a written instrument drawn in the usual form of a promissory note, in every respect, except the following clause, viz. "payable out of and from my separate property and estate, with interest payable quarterly."

The defendant, Richmond, is the drawer, and Van Doren is the payee and indorser. The defendant Van Doren being upon the stand as a witness in his own behalf, was asked what consideration was paid to or received by him for his indorsement. The question was excluded on the plaintiff's objection, and the counsel for the defendant excepted. The defenses set up are a cotemporaneous agreement to extend the time of payment for six months; and, secondly, that the note was obtained by false representations affecting the value of the property for which it was given; and that Van Doren indorsed the note without any consideration. Also, that the action is prosecuted for the benefit of Thomas Aitken, who made the alleged false representations, and who is alleged to be the real party in interest.

If the instrument upon which the action is brought, is to be considered a promissory note, the defendant was required to lay the foundation for inquiring into the consideration, by

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first proving that the plaintiff was not a *bona fide* holder, which had not been done when the question was put. If, on the contrary, as the defendant insists, the instrument was not a promissory note, no such condition could be imposed at the trial, and the question should have been admitted. A promissory note or bill, to come within the rules for the protection of the holders of mercantile paper, must be payable absolutely at some period, not depending upon a contingency, nor payable out of a particular fund.

I am not able to discover that this instrument is affected by any objection arising from these rules. The principal is payable in twelve months, and the interest quarterly. If the interest is not paid according to the promise, it all becomes due at the end of twelve months. It is "payable out of and from my separate property and estate;" but the separate property of Mrs. Richmond is not a particular fund. Individual promises are always payable from the separate estate of the maker. The expression of this fact does not state a particular fund. This ground of exception to the ruling does not appear to have been brought to the attention of the judge at the trial. It does not appear to have been then disputed that the instrument was a promissory note. If Adeline A. Richmond was a married woman at the time of making the note, the meaning of the words "my separate property and estate," would be quite intelligible; but such fact does not appear from the evidence, unless it be inferred from her being spoken of during the trial as "Mrs. Richmond." I do not think the explanation is necessary, as the words relied on do not refer to a particular fund, but to the whole estate of the maker.

The counsel for the defendant submitted to the ruling, without making any claim that the instrument was not a promissory note, and proceeded to give evidence affecting the title of the plaintiff to the note, as a *bona fide* holder for value.

The judge before whom the action was tried without a jury

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has found that the note was indorsed and delivered to the plaintiff before maturity, for value received. The counsel for the defendant insists that the evidence does not sustain this fact as found, and that the judge should have admitted the evidence offered of an agreement to extend the time of payment. The offer to prove the consideration paid to or received by the defendant Van Doren for his indorsement, was not renewed. The evidence showed that the plaintiff paid \$100 in cash and his check for \$2400 to Thomas Aitken about a week before the maturity of the note, which Aitken paid over to his wife, to whom it belonged. The only fact supposed to impair the effect of this evidence is, that Thomas Aitken, the witness called for the defense to prove the want of *bona fides* in the plaintiff's title, says that he does not recollect whether the check has been paid; that he delivered it to Mrs. Aitken, and he supposes it has been paid. Certainly, this evidence will not warrant any finding against the *bona fides* of the plaintiff's title to the note; so far as the evidence proves any thing, it is in favor of the plaintiff on that question.

Whether the instrument is subject to the rules of law governing mercantile paper or not, the evidence offered to show a contemporaneous agreement with the making or indorsement of the note, to extend the time of payment, was not admissible. Neither a promissory note, nor any other agreement in writing, can be varied or impaired by parol evidence. None of the objections urged by the defendants are sufficient to affect the regularity of the trial.

The judgment should be affirmed, with costs.

INGRAHAM, J. concurred.

SUTHERLAND, J. (dissenting.) I feel compelled to dissent from the conclusion brothers LEONARD and INGRAHAM have come to, in this case. I think the instrument declared on was not on its face a promissory note; and if so, certain evidence offered by the defendants was improperly rejected.

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It appeared, from the agreement executed at the same time the note was executed, and which provided for its execution, (which agreement was introduced by the plaintiff and received in evidence, under objection by the defendants,) that Adeline A. Richmond was a married woman when the note was executed; and I think this is rather the inference from the face of the note. And if she was, I do not see how a *personal* judgment could be obtained against her on the facts stated in the complaint or proved at the trial.

I think the judgment should be reversed, and a new trial ordered.

Judgment affirmed.

[NEW YORK GENERAL TERM, April 1, 1867. *Leonard, Sutherland and Ingraham*, Justices.]

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SMITH and MAURY vs. WOODRUFF.

Where the defendant has procured a trade mark closely resembling one already in use by the plaintiff, and has attached it to a perfume manufactured by him, adopting the same name and style of packages as the latter, with the intention of counterfeiting the plaintiff's trade mark, as well as imitating the article, and style of packages used by him, and of appropriating, through such counterfeit label, the market obtained for the perfumery of the plaintiff, and in this design he has been to some extent successful, and has thereby injured the plaintiff, it is a proper case for an injunction to restrain the use of the label or trade-mark, notwithstanding the defendant sets up the defense that the plaintiff, in selling his perfume, is attempting to impose upon and defraud the public; if the evidence upon that subject is conflicting.

That defense ought to be suggested by the court, whenever the imposition on the part of the plaintiff is flagrant. Thus when a quack compounds noxious and dangerous drugs, hurtful to the human constitution, and advertises them as a safe and sure remedy for disease; or when a charlatan avails himself of the prejudice, superstition or ignorance of some portion of the public to palm off a worthless article, even when not injurious, the case falls beneath the dignity of a court of justice to lend its aid for the redress of such a party, who has been interfered with by the imitations of another quack or charlatan. *Per LEONARD, P. J.*

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But the suggestion comes with a poor grace from one who has, by the imitation, been guilty of the same fraud or imposition upon the public, if such it happen to be. *Per* LEONARD, P. J.

**A**PPEAL from an order dissolving an injunction restraining the defendant from manufacturing and selling a perfume called "Sweet Opoponax of Mexico;" from selling any perfumery with that name; from using the name in connection with any perfumery; from using the plaintiffs' label, or any imitation or counterfeit thereof; and from using the label now employed by the defendant, copies of which are set out in the complaint.

*S. C. Conable*, for the appellants.

*W. F. Cogswell*, for the respondent.

*By the Court*, LEONARD, P. J. An examination of the papers, which are rather voluminous, satisfies me that there is no originality with the plaintiffs in the name. The same words and combination had been previously used.

The label and trade mark was designed and procured to be engraved by the plaintiffs in 1865. They used it nearly a year, when the defendant procured one very closely resembling it, and commenced to attach it to a perfume manufactured by him, adopting the same name, and style of packages. There can be no doubt that it was done with the intention of counterfeiting the plaintiffs' label or trade mark, as well as imitating the article and style of packages used. The article had obtained some success in the market, before the defendant commenced his imitation.

A young man, believed to be the son and agent of the defendant, applied to John A. Manget, a lithographer in the employment of Alphonse Brett, the artist who made the plaintiffs' labels, about September, 1866, to procure 1000 sheets of labels similar to the plaintiffs', which Manget declined to make. The firm of Brinkler & Kessler, litho-

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graphers, of Philadelphia, about the same time, manufactured 1000 sheets of labels in imitation of those used by the plaintiffs, on the employment of the defendant, who furnished a copy of the plaintiffs' label to the lithographer for imitation.

The first of October, 1866, was the time when the defendant commenced the sale of the perfume with the counterfeit labels.

The design of the defendant to appropriate to himself, through the counterfeit label, the market obtained for the perfumery by the plaintiffs, is evident ; and also that he has to some extent been successful, and has thereby injured the plaintiffs. The only plausible defense arises from the allegation of the defendant, that the plaintiffs are as wicked as he is, in that they attempt to impose upon and defraud the public, while he attempts only to defraud the plaintiffs.

The justice and morality of this defense is not very high, in the present instance, but this rule of law or equity has been recognized in several cases, and must be followed if the case is brought within its application. It is a defense that ought to be suggested by the court in some cases, and probably would be in all cases where the imposition is flagrant. For instance, where a quack compounds noxious and dangerous drugs, hurtful to the human constitution, and advertises them as a safe and sure remedy for disease ; or when some charlatan avails himself of the prejudice, superstition, or ignorance of some portion of the public, to palm off a worthless article, even when not injurious, the case falls beneath the dignity of a court of justice to lend its aid for the redress of such a party, who has been interfered with by the imitations of another quack or charlatan. But the suggestion comes with a poor grace from one who has, by the imitation, been guilty of the same fraud or imposition upon the public, if such it happens to be.

The present case does not, in my opinion, upon the present evidence, come within the rule sought to be invoked. It

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is said that the plaintiffs, in connection with their label, put forth a puff, in which it is stated that "The Opoponax is a native flower from Mexico, of rare and very rich fragrance, *from which this extract is distilled,*" &c. On the part of the defendant, several perfumers make affidavit that they have examined the perfume of the plaintiffs; that they can tell, approximately, the ingredients from which it is made; and that it is not distilled from the flower of opoponax, but is a compound of several well known tinctures, or essential oils, combined with pure spirits. Others state that there is a resinous gum in the market, of a disagreeable odor, but no flowers of opoponax.

The plaintiffs, and their chemists, swear that the said opoponax is used in the preparation, distillation and manufacture of the said perfume, and that the perfume is made from it. Several perfumers also make affidavit that it is not possible for any perfumer to tell the ingredients of the plaintiffs' perfume.

Under this contradictory state of the evidence, the principle sought by the counsel for the defendant to be here applied is not available to him.

The order appealed from should be reversed, and the injunction restored, so far as to restrain the use of the label or trade-mark, with \$10 costs of the motion, and \$10 costs of the appeal, to abide the event.

[NEW YORK GENERAL TERM, April 1, 1867. *Leonard, Sutherland and Ingraham, Justices.*]

BERLIN *vs.* HALL, impleaded, &c.

To a proceeding under section 375 of the Code, for the purpose of having a defendant adjudged to be bound by a prior judgment entered in the action, after service of process upon his former partner and co-defendant, only, who allowed judgment to be entered for want of an answer, the statute of limitations cannot be set up as a defense, although it had run against the demand before the service of process upon the partner.

THIS is an action upon a note which became outlawed June 15th, 1863. The defendant Blashfield was served with process December 29th, 1863. He suffered default, and on the footing of the judgment entered against him, the defendant Hall was served with a summons to show cause why he should not be bound by the judgment, under the provisions of the Code relating to proceedings against joint debtors. (See §§ 375-381.) There was no pretense on the part of the plaintiff, that at the time of serving Blashfield, there was any difficulty in finding Hall, or that he was not in the state, and just as accessible and as easy to serve as Blashfield. The defense relied upon by Hall was, that the cause of action accrued more than six years before the original commencement of the suit, by service upon Blashfield. To overthrow this defense, the plaintiff relied upon section 379 of the Code as amended in April, 1849, by the addition of the last five words. As thus amended, the section reads as follows :

“ Upon such summons, the party summoned may answer within the time specified therein, denying the judgment, or setting up any defense which may have arisen subsequently, and in addition thereto, if he be proceeded against according to section 375, he may make the same defense which he might have originally made to the action, *except the statute of limitations.*”

The cause coming on to be tried, and a trial by jury having been duly waived by the parties in open court, and a trial thereof by the court having been had, the judge found as facts in the case :

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*First.* That on the 12th day of December, 1856, the defendants and one Chauncey Clark, deceased, being copartners under the style of Blashfield, Clark & Co., made their promissory note, bearing date on that day, whereby six months after the said date, they promised to pay to the order of one W. B. Lloyd the sum of twelve hundred and sixty-four dollars and ninety cents, and that said note was, before its maturity, indorsed by said Lloyd, and by him transferred to the plaintiff; that the plaintiff was the lawful owner and holder of said note, and that it has not been paid.

*Second.* That on the 29th day of December, 1863, this action was commenced by the service of a summons upon William H. Blashfield, one of the defendants, and that judgment was entered herein against said Blashfield, by default, in favor of the plaintiff, on the 5th day of February, 1864, for the sum of one thousand eight hundred and five dollars and seventy-six cents. That said judgment was entered in form against all the defendants as joint debtors.

*Third.* That on the 28th day of April, 1864, the plaintiff caused to be personally served on Erie L. Hall, one of the defendants herein, a summons, pursuant to chapter 2, title 12, part 2, of the Code, requiring said defendant to show cause, within twenty days after the service thereof, why he should not be bound by the judgment in this action, and above described.

*Fourth.* That said defendant Hall thereupon appeared in the action, by attorney, and put in an answer to the complaint therein.

The judge found, as conclusions of law in the case:

*First.* That at the time of the original commencement of this action by the service of the summons therein on the defendant Blashfield, the action was barred by the statute of limitations.

*Second.* That by section 379 of the Code of Procedure, the defendant having been summoned as aforesaid, cannot plead the statute of limitations in bar of the action.

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*Third.* That the plaintiff is entitled to judgment against the defendant Hall for the sum of one thousand eight hundred and five dollars and seventy-six cents, with interest from the 5th day of February, 1864; and that the said Hall be bound by the judgment so in form entered against the said defendants Blashfield and Hall, as survivors, upon the service of the summons on the said Blashfield as aforesaid.

From the judgment so entered, the defendant Hall appealed.

*Eliel F. Hall*, for the appellant.

*F. C. Cantine*, for the respondent.

*By the Court*, LEONARD, P. J. This is a proceeding under section 375 of the Code, for the purpose of having the defendant Hall adjudged to be bound by a prior judgment entered in the action, after service of process upon his former partner only, who allowed judgment to be entered for want of an answer. Apparently, the statute of limitations had run against the demand before the service of process upon the partner.

The defendant Hall insists upon the statute as a bar to this proceeding.

Section 379 of the Code, by its literal reading, precludes the defense of the statute of limitations where it had arisen before the commencement of the original action, but allows it when it arises subsequently. It is suggested that a little transposition of the last five words of the section would very naturally and properly change the reading, so as to preclude the defense where it arises subsequently, and allow it when it had arisen before the original action was commenced. Place those words next after the word "*subsequently*," in the middle of the section, and the result suggested will be produced. The difficulty is that those words were placed just where they occur, by an amendment of the Code, in 1849, when no other change was made in the section. It has so forcibly the appearance of design, that I am fully satisfied it would

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be in defiance of the legislative intention, to construe the section as if the words were differently placed. At the time of the amendment it had long been held that a payment, or a promise, by one member of a firm, revived the debt, and barred the statute, although the firm had been long dissolved, at the time of the payment or promise. The doctrine is distinctly recognized as existing, and is overruled in *Van Keuren v. Parmlee*, (2 N. Y. Rep. 523,) which was decided after the amendment of 1849 was adopted. The amendment gives the same effect to a judgment; which is in effect a confession of the debt by record evidence.

Had the whole section been brought into existence at the time it was amended, I might have leaned to the suggestion that the legislature did not express their intention. But an amendment placing five words at the end of a section will not admit of their being placed in some other position by the rules of construction; unless they lead to a greater absurdity than is here presented.

The judgment should be affirmed, with costs.

[NEW YORK GENERAL TERM, April 1, 1867. *Leonard, J. C. Smith and Ingraham, Justices.*]

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BEARNS vs. THE COLUMBIAN INSURANCE COMPANY.

In time policies, the rules as to deviation do not apply to the same extent as in voyage policies.

Under time policies, the mere intention to deviate is not sufficient to avoid the policy, although during the period of the violation of the warranty, the vessel is not covered by the policy.

Time policies were issued by the defendants upon the bark *Cora*, and her freight; the policy on the vessel being for one year from June 19, 1862, and that upon the freight being for one year from June 20, 1862. The policy on the vessel contained a warranty not to use the Min river (in China) higher than the anchorage below the Kimpai pass. The bark sailed March 29, 1863, from Shanghai to Newchang, at the mouth of the Lian Ho river, in the northern part of China. In entering the Lian Ho river, the vessel was dam-

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aged, but the injuries were not such as to make her unseaworthy. On the 4th of May, 1863, the bark took in a cargo for Fu-chau-fu, a port on the Min river, and sailed therefor. On leaving Newchang she sustained more serious injury. After she left the Lian Ho river, she sustained no further disaster. On the 18th of June, 1863, she arrived at Pagoda anchorage, ten miles above Kimpai pass, on the Min river. Upon a survey held there, it was found that she was badly injured, and it was decided to dismantle and sell the vessel, which was done. It being admitted that the injuries were sustained in entering the mouth of the Lian Ho river, on the voyage to Newchang, and on leaving that port at the same place, during the period the vessel was covered by the policy;

*Held* that upon these facts there was nothing to warrant the court in holding that the insured was not entitled to recover for damage done to the vessel while she was not in violation of any of the provisions of the policy. That it was not in any way within the prohibition either to enter or leave the port of Newchang and the Lian Ho river; and whatever was intended after the vessel left that port could in no way affect the plaintiff's right of recovery for any damage previously incurred.

*Held, also*, that the policy upon the *freight* being intended to cover the freight during the whole period of insurance, and not confined to the period when the vessel sailed from the Lian Ho river, the warranty was violated when she entered the Min river above the Kimpai pass. That it mattered not what was determined upon afterwards, or what befell the vessel while that violation existed. The policy ceased to cover the freight from that time. And the vessel having been sold while in the river, and before the violation of the warranty terminated, the plaintiff could not recover for freight thereafter.

**T**HIS action is brought to recover on two policies of insurance on the bark Cora, and for the freight. The policies were time policies. The policy on the vessel being for one year from the 19th of June, 1862, that insuring the freight being for one year from the 20th of June, 1862.

The policy on the vessel contained a warranty not to use the Min river, in China. The policy on the freight contained a warranty not to use the Min river higher than the anchorage below the Kimpai pass. The bark sailed on the 29th of March, 1863, from Shanghai to New Chang at the mouth of the Lian Ho river in the northern part of China. In entering Lian Ho river, the vessel was damaged, but the injuries were not such as to make her unseaworthy. On the 4th of May, 1863, the bark took in a cargo for Fu-chau-fu, a port on the

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Min river and sailed therefor. On leaving New Chang at the mouth of the Lian Ho river, she sustained more serious injury. After she left the Lian Ho river, she sustained no further disaster. On the 13th of June, 1863, she arrived at Pagoda anchorage, ten miles above Kimpai pass on the Min river. Upon a survey held there, it was found that she was badly injured, and it was decided to dismantle and sell the vessel. It was not claimed that any damage was done to the vessel in the Min river, but it was admitted that the injuries sustained were caused at a place common to a voyage to and from New Chang from and to any other port than Fu-chau-fu or the Min river.

The defendants moved for a nonsuit, upon the ground that the warranty in regard to the use of the Min river, in each policy, having been violated, the plaintiffs could not recover. The court denied the motion.

The defendants requested the court to charge the jury the same as to the effect of entering the Min river, and that the defendants were thereby discharged from all liability under the policy, which was also refused, and the defendants excepted. The jury found a verdict for the plaintiff.

*John E. Parsons*, for the plaintiff. I. In the case of voyage policies, though a deviation vitiates the policy, it is well settled that an intention to deviate does not do so; and that the insurer is liable for all damages sustained before the vessel reaches the point of divergence. In this case, it is true, the "Cora" had taken in a cargo to leave at Fu-chau-fu, on the prohibited river, but that fact has been repeatedly held to be immaterial. (*Hare v. Travis*, 7 B. & C. 14. 14 E. Com. L. 4.) Policy on a voyage at and from Liverpool to London. The captain took in goods at Liverpool for Southampton, intending to go first to Southampton. He did go there, delivered the goods shipped for there; thence went to London. Held: Putting into Southampton was a deviation, but the policy attached to the dividing point; and there was

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liability for loss previously sustained. *Kewley v. Ryan*, (2 H. Bl. 343,) is precisely similar. In *Marine Insurance Company v. Tucker*, (3 Oranch, 357,) a vessel was insured at and from Kingston in Jamaica for Alexandria, and sailed with intent to go first to Baltimore and then to Alexandria ; before her arrival at the dividing point, she was captured. The company were held liable. *Hobart v. Norton*, (8 Pick. 161,) is a very strong case. Voyage from Boston to Charleston. The captain took goods for Edgerton, intending to stop there, and did so, though, as it happened, stress of weather would have compelled him to do so, had he not had the intention. He then proceeded to Charleston, and for a subsequent loss the underwriter was held liable ; the intention to deviate not being perfected, the stress of weather really compelling the captain to seek Edgerton. *Henshaw v. The Marine Insurance Co.* (2 Caines, 274.) Insurance upon a voyage at and from Newry, in Ireland, to New York. The captain took passengers for, and landed them in Halifax ; but in the Irish Channel, before reaching the dividing point, the vessel struck a rock, and received damage, for which the company were held liable. (*Foster v. Wilmer*, 2 Stra. 1249. *Carter v. The Exchange Ass. Co. id.* *Thellusson v. Fergusson*, Dougl. 361. *Heselton v. Alnuth*, 1 M. & S. 46. *Middlewood v. Blakes*, 7 D. & E. 162. *Silva v. Low*, 1 Lex. Mer. Amer. 324. *S. O. 1 John. Cas. 184. Lawrence v. Ocean Ins. Co. 11 John. 261. 1 Phillips on Ins. § 1001.*)

II. By analogy, an intention to break the warranty not to use the Min river, did not operate as an immediate breach ; and the loss having happened before the "Cora" reached the point of divergence, when first could there be an actual breach, the defendants became liable. A deviation, in the sense of the substitution of a different terminus, cannot be predicated of a time policy. (*Union Ins. Co. v. Tysen*, 3 Hill, 118. *Keeler v. Fireman's Ins. Co., Id.* 250.) The "Cora" did, after the loss, use the Min river, and it may be claimed that such subsequent breach avoided the policy *ab*

*initio*, and so discharged the perfected liability of the defendants. This is not so in the case of a time policy—such a policy would only become avoided from the breach, and as to future losses. 1. The use of the Min river related to a circumstance necessarily subsequent to the commencement of the risk, and in such case “the assured is entitled to recover for an antecedent loss, though the warranty should not be complied with.” (1 *Phillips on Ins.* § 771. *Taylor v. Lowell, Admr.* 3 *Mass. R.* 347. *Am. Ins. Co. v. Ogden*, 15 *Wend.* 532.) Cases of a vessel warranted seaworthy, subsequently becoming unseaworthy. 2. A warranty, the breach of which defeats the policy *ab initio*, must be in the nature of a condition precedent, the effect of the non-fulfillment of which is that the policy never attached, and the assured is entitled to a return of the premium. (*Delavigne v. The United Ins. Co.*, 1 *John. Cas.* 310.) In cases asserting that the breach of a warranty destroys the policy from the beginning, it will be found that the warranty was in its nature a condition precedent. (*Rich v. Parker*, 7 *T. R.* 705. *Colby v. Hunter*, 3 *C. & P.* 7.) For example, warranty of neutral property. (*Duguet v. Rhinelanders*, 1 *John. Cas.* 360. *Jackson v. The N. Y. Ins. Co.*, 2 *id.* 191. *Elbers v. The United Ins. Co.*, 16 *John.* 128.) That a vessel is an American vessel. (*Murray v. The United Ins. Co.* 2 *John. Cas.* 168.) 3 *Kent's Com.* 288, where Chancellor Kent uses condition precedent as a term synonymous with that warranty a breach of which he says avoids the contract *ab initio*. 3. The warranty in this case is in the nature of a condition subsequent, the effect of the non-observance of which is only to defeat the contract as in favor of the defaulting party from the time of the breach. (4 *Kent's Com.* 125.) 4. From June, 1862, to May, 1863, the “Cora” was admittedly under the protection of the two policies. To that time there had not been even the intention to violate their terms. For any partial loss, therefore, up to that time the defendants were liable; and the policies having attached, the assured could not claim

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a return of the premium. The policies thus obtained vitality ; how long did it continue ? obviously up to the fact that destroyed the policy, which was the use of the Min river *subsequent to the loss*. In *Day v. The Orient Mut. Ins. Co.*, (1 *Daly*, 13,) the loss was subsequent to the breach.

III. There was a total loss of the vessel. 1. Actual, because it was admitted that the "Cora" was made incapable of rendering further sea service. 2. Constructive, because to repair her would have cost, over all deductions, \$14,633.28, or more than one-half her valuation of \$20,000, which circumstance the vessel policy makes a constructive total loss. The freight policy provided in terms that "in case of a total loss of the vessel, actual or constructive," \* \* "a total loss is to be paid under the" freight policy. The amount of the loss on the freight policy is admitted. The freight earned on her voyage by the "Cora" only amounted to \$3365. The freight was however valued at \$4000 in the policy "carried or not carried," by which words the company assume the risks of a short freight. (*De Longuemere v. Phoenix Ins. Co.*, 10 *John*. 127.)

IV. There is no question as to the amount due on the vessel policy. The plaintiff is therefore entitled to judgment for the amount of the verdict.

*D. D. Field*, for the defendant. I. The warranty in the policy on the vessel that she should not use the Min river, clearly prohibits any voyage to a port upon that river. 1. Contracts are to receive such an interpretation as will give every stipulation reasonable effect. (*Ward v. Whitney*, 8 *N. Y. Rep.* 446. *Decker v. Furniss*, 14 *id.* 622. *Hamilton v. Taylor*, 18 *id.* 358. *Richards v. Warring*, 39 *Barb.* 42. *James v. Tallent*, 5 *Barn. & Ald.* 889.) 2. If there is any doubt as to the meaning of this clause, it must be interpreted in the sense in which the insured (who makes the warranty) had reason to believe that the insurer understood it. (*Barlow v. Scott*, 24 *N. Y. Rep.* 40.) 3. If any uncertainty still

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remains, it must be construed most strongly against the insured; this clause being in the nature of a promise on his part. (2 *Parsons Contr.* 5th ed. 506.) 4. Applying these rules to the case in hand, it is evident that the warranty not to use certain ports means that the insured will not send his vessel to any of them. Vessels are seldom wrecked while actually using a port. The perils which cost most to the insurer are mainly those which happen upon the way to ports or in attempting to enter them; and it was against these that the defendant wished to be, and believed that it was, protected. The vessel in this case was perfectly safe when once within the Min river. It was the danger of entering the river against which the policy was meant to protect the insurer.

II. The act of sailing for a port on the Min river was a deviation from the voyage prescribed by the policy. This was a time policy, intended to cover not merely one special voyage, but all kinds of voyages not excepted therefrom. The insurer could not use any different language, which should more plainly exclude a voyage to the Min river. Let us, however, suppose that a voyage policy should be made out, permitting any voyage except to the Min river. That would be in effect the same as the policy now sued upon; and there can be no doubt that under such a policy the plaintiff could not recover, upon the facts which appear in this case. This is settled in cases of decisive authority. (*Forbes v. Church*, 3 *John. Cas.* 159. *Tasker v. Cunninghame*, 1 *Bligh*, 87. *Wooldridge v. Boydell*, 1 *Dougl.* 16. *Way v. Modigliani*, 2 *Term Rep.* 30. *Stocker v. Harris*, 3 *Mass. R.* 409. *Sellar v. McVicar*, 1 *Bos. & Pul.* 23. *Marine Ins. Co. v. Stras*, 1 *Munf.* 408. 2 *Pars. Mar. Law*, 309.) See particularly *Merrill v. The Boylston Fire & Marine Ins. Co.* (3 *Allen*, 247.)

III. It is to be observed that this was not a case of mere intention to deviate. The whole cargo was destined for Fuchau-fu, a port which the vessel was forbidden to enter. It is true that she was destined to proceed from thence to Shang-

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hai ; but every vessel is destined to proceed further after landing her cargo. No ship, while seaworthy, is sent to a port with the design that she shall stay there forever ; least of all does an American vessel enter a Chinese port with any intention of staying there longer than is necessary to discharge her cargo. The ultimate destination of the vessel is therefore wholly immaterial. *The voyage* upon which it was injured, was a voyage for a port on the Min river, and was therefore not a voyage which the defendant ever agreed to insure. The case is in every aspect governed entirely by the decisions already cited, which show that the policy never attached upon this voyage.

IV. The vessel was expressly *warranted* not to use the Min river. This warranty was confessedly violated, and the defendant was thereby discharged from the obligations of the policy.

1. It is undoubted law that the breach of an express warranty, whether material or not, puts an end to the contract. It is not necessary to show that the insurer suffered any injury from such breach. (2 *Pars. Mar. Law*, 104. *Newcastle Ins. Co. v. Macmorran*, 3 *Dow*, 255. *Blackhurst v. Cockell*, 3 *Term Rep.* 360. *De Hahn v. Hartley*, 1 *id.* 343. 2 *id.* 186.)
2. The warranty was violated in letter as well as in spirit, by the actual entry of the vessel into the prohibited river.
3. But it was previously violated in spirit and substance by the very commencement of a voyage for the prohibited river. From the moment of sailing, the vessel was out of the protection of the policy.

V. The warranty of the freight policy was also confessedly violated, the vessel going above the Kimpai pass in the Min river. And there being no loss of the vessel for which the insurers were liable, the clause in the margin of the freight policy does not apply.

*By the Court*, INGRAHAM, J. The only questions in this case arise on the fact which is admitted that the vessel in-

sured went to a port on the Min river, contrary to the provisions in both policies. These being time policies, the rules as to deviation do not apply to the same extent as in voyage policies. Even in a voyage policy, the underwriter is held liable although a deviation was intended, until she reaches the point of divergence and turns off from the voyage insured. (*The Marine Ins. Co. v. Tucker*, 3 Cranch, 357. *Maryland Ins. Co. v. Wood*, 7 id. 404. *Hare v. Travis*, 7 B. & C. 14. *Kewley v. Ryan*, 2 H. Bl. 343. *Hobart v. Norton*, 8 Pick. 161. *Lawrence v. Ocean Ins. Co.* 11 John. 241.)

Under time policies, the mere intention to deviate has never been held sufficient to avoid the policy, although during the period of the violation of the warranty, the vessel is not covered by the policy. In *The Union Ins. Co. v. Tyen*, (3 Hill, 118,) Cowen, J. says: "It is of the nature of the policy in question (a time policy) that it limits the vessel to no geographical track. It is impossible, therefore, to make out a defense on the ground of a deviation in the ordinary sense of the word. Nor can any particular trip or voyage be regarded as having the effect of a deviation, unless it be undertaken in fraud of the policy."

In the present case, the admission is that the injuries were sustained in entering the mouth of the Lian Ho river, on the voyage to New Chang, and on leaving that port at the same place. During this period the vessel was covered by the policy; up to this time the warranty had not been violated, and the admission in the case is, that she suffered no further disaster after leaving the Lian Ho river.

There is also another rule applicable to such cases, which if the question was doubtful, would be in favor of the respondents. It is that clauses in a policy providing for exceptions, being the words of the insurer and not of the insured, are to receive a strict construction against those for whose benefit they are introduced, (*Hoffman v. Aetna Ins. Co.* 32 N. Y. Rep. 405;) and where a doubt exists as to the effect of intended violation of the warranty, the insurer should be held

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to a strict construction, so as not to avoid the policy until the same is actually violated. The case of *Barlow v. Scott*, (24 N. Y. Rep. 40,) does not in any way conflict with this rule. That was a case of a sale of lands where the deed was not such as was understood between the parties, and the vendor was held bound to fulfill his promise as understood between them.

Upon these facts, I think there is nothing to warrant us in holding that the plaintiffs are not entitled to recover for damage done to the vessel while she was not in violation of any of the provisions of the policy. It was not in any way within the prohibition either to enter or to leave the port of New Chang and the Lian Ho river. Whatever was intended after she left that port can in no way affect the plaintiffs' right of recovery for any damage previously incurred.

As to the other claim, for recovery on the policy insuring the freight, a different question arises. The insurance in that policy was for a specific sum at which the freight was valued, and no proof of value was necessary. The parties have agreed upon the sum which the plaintiffs should recover if they are entitled to any thing. (*Delano v. Am. Ins. Co.* 42 Barb. 142.)

But this policy was intended to cover the freight during the whole period of insurance. It was not confined to the period when the vessel sailed from the Lian Ho river, and the warranty was violated when the vessel entered Min river above Kimpai pass. It matters not what was determined upon afterwards, or what befel the vessel while that violation existed. The policy ceased to cover the freight from that time. The vessel having been sold while in the river and before the violation terminated, I see no ground on which the plaintiffs could recover for freight thereafter. Up to that period there had been no loss of freight. If there was any afterwards, it was at a time when the violation was in existence, when the policy ceased to be in force and its provisions did not apply.

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Withers v. New Jersey Steamboat Co.

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For this portion of the recovery, the judge erred in not instructing the jury that the plaintiffs could not recover, as requested by the defendant's counsel.

The case being heard upon exceptions before judgment, the judgment should be set aside and a new trial ordered, with costs to abide the event, unless the plaintiffs within ten days elect to remit so much of the recovery as is claimed under the policy on the freight ; in which case judgment is ordered for the balance.

[NEW YORK GENERAL TERM, April 1, 1867. *Leonard, James C. Smith and Ingraham, Justices.*]

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WITHERS and others vs. THE NEW JERSEY STEAMBOAT  
COMPANY.

In an action by the plaintiffs as owners of ninety-one kegs of tobacco, to recover the damages sustained by the tobacco while in the defendants' possession as a common carrier, it appeared that the tobacco had been sold by the plaintiffs to *arrive*—sixty-seven kegs to S. & Co., and twenty-four kegs to C. & Co. The whole was consigned to S. & Co., but they refused to take the tobacco in fulfillment of the sale to them, on account of its damaged condition, and so notified the plaintiffs. C. & Co. took the twenty-four kegs at the contract price, sixty-two and a half cents per pound, but it did not appear that it was taken on account of that contract.

*Held* that these facts did not warrant the objection that the tobacco was delivered by the plaintiffs to the purchasers, and that no right of action for the recovery of damages remained in the plaintiffs.

That the tobacco having been damaged before it reached the purchasers, the delivery could not be claimed as a performance of a contract for the delivery of sound tobacco.

*Held also*, that there was no ground for objecting that S. & Co. could not act as agents or consignees of the tobacco for the account of the plaintiffs; they having notified the plaintiffs that they did not receive it as purchasers.

THIS was an appeal, by the defendants, from a judgment rendered at the circuit, on a trial by the court without a jury. The opinion states the facts.

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Withers v. New Jersey Steamboat Co.

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*Chas. Jones*, for the appellants.

*J. E. Burrill*, for the respondents.

LEONARD, P. J. Appeal from a judgment rendered at the circuit. Trial by the court, without a jury. Action to recover damages sustained on ninety-one kegs of tobacco, transported by the defendants, as common carriers, from Albany to New York, in consequence of the negligence of the defendants. The allegations of the complaint were all put at issue by the answer, in respect to the title of the plaintiffs, the negligence of the defendants, and the damage sustained.

The evidence showed that the tobacco was received by the defendants, on board the steamer *St. John*, at Albany, in good order, and brought to the city of New York, where it arrived at an early hour in the morning, and was landed on the dock. It was raining, at the time, and the tobacco was exposed for several hours. It was imported from Canada, and the consignees were unable to remove it until a custom house permit was obtained, after the lapse of several hours. The defendants did not notify the consignees of the arrival of the tobacco, but their carman saw it on the dock, at about eight o'clock in the morning; at which time he notified the agents of the defendants that it was suffering damage from the rain, and required covering, which was then partially and insufficiently done. The carman then proceeded to the consignees and notified them of its arrival, at about 9 o'clock, A. M. and the tobacco was then removed with all the expedition that the entries at the custom house would admit, but not till large damages had occurred. The defendants were notified of the injury sustained, and requested to examine the tobacco. A survey was held, and the defendants notified, but they did not attend. The merchants who surveyed it reported it damaged; and they testified that the value when it arrived, if it had been in good order, was one dollar per pound, and that in its damaged condition it was worth sixty-two and a half cents.

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Withers v. New Jersey Steamboat Co.

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It was not sold until Sept. 8th, although the damage occurred July 25th, 1864.

During that time the market for sound tobacco fell off ten to fifteen per cent, but the ratio on damaged tobacco would be less. Some thought it would have brought more if it had been sold at once, and others thought it brought as much when it was sold as it would have done if sold earlier. There were some negotiations by the defendants for taking the tobacco for their own account, which delayed the sale till after the middle of August.

The tobacco had been sold by the plaintiffs to arrive—sixty-seven kegs to Smith & Co. and twenty-four kegs to Connolly & Co.

Smith & Co. were consignees of the whole of it, but they refused to take the tobacco, in fulfillment of the sale to them, on account of its damaged condition, and so notified the plaintiffs. Connolly & Co. took the twenty-four kegs at the contract price—62½ cents per pound, agreed on in March preceding—but it does not appear that it was taken on account of that contract. The evidence does not appear to be directed to that question, as to Connolly & Co. but it cannot be credited that they would receive a damaged article, injured to the extent of almost one-half, as in fulfillment of a contract for the delivery of sound tobacco. The evidence does not show it to have been received on the March contract.

These facts do not warrant the point made by the defendants' counsel, that the tobacco was delivered by the plaintiffs to the purchasers, and that no right of action for the recovery of damages remained in the plaintiffs. The tobacco which the plaintiffs agreed to deliver was to be a sound article. Before it reached the purchasers it was damaged, and could not be claimed as a performance of a contract for the delivery of sound tobacco.

Nor is there any ground for objecting that Smith & Co. could not act as agents or consignees of the tobacco for the

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account of the plaintiffs. That firm notified the plaintiffs, without delay, that they did not receive it as purchasers.

As the defendants landed the tobacco at an unseasonable hour, they could not have reasonably expected the consignees to be on hand to receive it instantly ; especially as they had not notified them that it had arrived, or was being landed ; and the article, being in bond, also would necessarily require some delay, after the commencement of business hours, for the purpose of transacting the custom house business.

The evidence proved the damage to the extent found by the judge.

The complaint demanded \$7147.38 damages, and the judge allowed \$8887.90, besides interest.

The complaint must be deemed amended, to conform to the fact found, in this respect.

The judgment should be affirmed, with costs.

J. C. SMITH, J. concurred.

SUTHERLAND, J. (dissenting.) It appears, from the evidence of James R. Smith, of the firm of Wm. H. Smith & Sons, that twenty-four kegs of the tobacco had, in March or April, previous to the arrival of the tobacco in New York, been sold by Smith & Sons, for the plaintiffs, at sixty-two and a half cents per pound, to Connolly & Co. a New York firm, and that Connolly & Co. after the arrival of the tobacco in New York, were notified of its arrival, and of its damaged condition, and were told they need not take the twenty-four kegs in its damaged condition, but that, nevertheless, Connolly & Co. did take the twenty-four kegs, at the contract price ; and the presumption is that they have paid the plaintiffs, or their agents, Smith & Sons, for the twenty-four kegs, at the contract price. If this evidence is true, and there is nothing in the case to contradict or in any way to impeach it, and it would appear to be a conceded fact, then the plaintiffs have received, or are entitled to receive, from Connolly & Co.

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the full contract price of the twenty-four kegs ; and if so, it is difficult to see how, *as to the twenty-four kegs*, the damage to the tobacco was, or has been, any damage *to the plaintiffs*.

I think the judgment should be reversed and a new trial ordered, unless the plaintiffs consent to deduct from the judgment the difference as to the twenty-four kegs, between sixty-two and a half cents and a dollar per pound.

The net weight of the twenty-four kegs is stated by a witness (James R. Smith) to be 5816½ pounds.

Judgment affirmed.

[NEW YORK GENERAL TERM, April 1, 1867. *Leonard, James C. Smith and Ingraham*, Justices.]

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 STERLING & BUNTING vs. JAUDON *et al.*

The mere fact that a check, paid out by a member of a firm, is in the name of the firm, is not sufficient notice to the parties receiving it that it is partnership property; nor enough to put them on inquiry before crediting the amount to the private account of the partner of whom they receive it.

The plaintiffs employed the defendants, who were brokers, to sell gold for them to the amount of \$30,000. They had not the gold to deliver, but it was intended to sell it short, in expectation of a fall. The defendants made the sale, and notified the plaintiffs. A deposit was made with them, in the check of the plaintiffs' firm, for \$15,700, which the plaintiffs alleged was to be placed to their credit. Subsequently, the defendants gave notice to the plaintiffs that they would require some money the next day; and \$4000 was paid them. The defendants afterwards gave notice that unless they had a further margin, they should close out the gold in an hour. They then bought the gold for the plaintiffs, at a large loss. The plaintiffs denied their right to do so, and repudiated the transaction, and brought an action to recover back the moneys deposited.

*Held* that the defendants were not bound to continue liable for the plaintiffs' contracts for an indefinite period. That if the margin was deficient they might have closed the transaction without notice, by purchasing the gold on the plaintiffs' account; but if they were unwilling to continue liable even with the margin, they could give notice to that effect, and then,

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if after a reasonable notice, the plaintiffs did not comply, they could act in the same way.

In such a transaction, no notice is necessary of the time and place at which the brokers will make the purchase. That rule only applies to a pledge of stocks or other securities for the payment of a debt.

THE plaintiffs made a contract with the defendants to sell gold for them to the amount of \$30,000. They had not the gold to deliver, but it was intended to sell it short, in expectation of a fall. The defendants made the sale, and notified the plaintiffs. A deposit was made with them, in the check of the firm, for \$15,700, which the plaintiffs allege was to be placed to the plaintiffs' credit. About the 1st of November the defendants gave notice to the plaintiffs that they would require some money the next day, and a check for \$4000 was paid them. The defendants afterwards gave notice that unless they had a further margin, they should close out the gold in an hour. They afterwards bought the gold for the plaintiffs at a large loss. The plaintiffs denied their right to do so, repudiated the transaction on their part, and brought this action to recover back the moneys deposited by them with the defendants.

The orders for the plaintiffs were given by Erasmus Sterling. He also had transactions of a similar character with the defendants on his own account. The plaintiffs proved by Erasmus Sterling that the money deposited with the defendants in their checks was to be placed to the account of the firm, and none to the individual account of Erasmus Sterling, while the defendants testified that they were directed by him to apply the proceeds of the check to both accounts. This question was submitted to the jury. There was some evidence as to a custom among brokers, which was submitted to the jury. The plaintiffs claimed such custom to be illegal, and asked to have the jury so instructed, which was refused. The court also charged the jury, that they were to decide whether Sterling gave directions at the time of delivering the check of \$15,700 to divide it to both accounts, and if so

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that they were authorized to do so. To this the plaintiffs excepted. There were some requests to charge, which the court refused, and to which there were exceptions.

The jury found for the defendants. A motion for a new trial was denied, and judgment was entered for the defendants. The plaintiffs appealed from the order and the judgment.

*S. P. Nash*, for the plaintiffs.

*Stanley, Langdell & Brown*, for the defendants.

*By the Court*, INGRAHAM, J. The first point made by the plaintiffs is as to the right of the defendants to appropriate the money of the firm to the private account of Erasmus Sterling. It is very clear they would have no such authority without instructions so to do. Whether or not they had such orders at the time the money was paid to them was to be decided by the jury on contradictory testimony. They found for the defendants, and such finding necessarily involves a finding that they had such instructions from Sterling when the money was paid. The question then is whether the judge erred in charging the jury "if Sterling directed the firm check to be applied in whole or in part to his private account, the defendants could so apply it." It must be remembered that all the transactions were made by E. Sterling, who had previously settled up accounts of the firm. No notice was given in any way that these funds were the property of the firm, and the only fact on which the plaintiffs can rely is, that the check, being in the name of the firm, was sufficient notice to the defendants that it was partnership property, and was enough to put them on inquiry before giving credit to E. Sterling on account of it. This is not the case of paying an old debt with partnership funds, but it is an incurring of liability on the strength of the payment. It was used to increase the margin of E. Sterling on

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his private transaction, without which the defendants would not have incurred the additional risk of holding themselves liable to furnish the gold for Sterling on his contract, when the price was rising.

I do not think the mere fact that the check was the check of the firm was sufficient notice. All the cases which hold the delivery of partnership property to a third person for the private account of one of the partners, to be invalid, base that rule upon the fact of knowledge on the part of the party receiving it. The mere fact of the check being that of the firm is not such notice. If it be so, then in all cases where a man pays the check of a third party, the person receiving it would be compelled first to inquire as to the *bona fides* of the check and the right of the party to use it. Such a rule would not answer in a commercial community. The presumption may just as well be indulged that the firm held money belonging to the individual partner, as that he was guilty of a fraud upon his copartners. Some other proof was necessary to establish notice.

The plaintiffs contend that the notice requiring a further margin or that the defendants would close the gold for their account at the market price on that afternoon, was insufficient. The defendants were not bound to continue liable for the plaintiffs' contracts for an indefinite period. If the margin was deficient, they might have closed the transaction without notice by purchasing the gold on the plaintiffs' account. If they were unwilling to continue liable even with the margin, they could give notice to that effect, and then if, after a reasonable notice, the plaintiffs did not comply, they could act in the same way.

In such a transaction as this, no notice is necessary of the time and place at which they will make the purchase. That only applies to the pledge of stocks or other securities for the payment of a debt. The defendants were bound to make the purchase at the market price, and in purchasing they assumed the responsibility to the plaintiffs to do so. We

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have so held lately in a case decided in the general term. Some evidence was given as to a custom among brokers entitling them to close out an account of their customer with a reasonable notice. There was some contradiction among the parties on this point. The evidence was received without objection, and the judge left it to the jury as evidence in the case. The plaintiffs' counsel requested the judge to instruct the jury to disregard it as an illegal custom, which he refused to do. There was no error in this refusal. Whether the custom was proven or not was immaterial. It was nothing more than the legal right of the defendants without a custom, and the attempt to sustain that right by proof of custom was unnecessary. Whether made out or not, it would not have altered the legal liabilities of the parties.

Judgment should be affirmed.

[NEW YORK GENERAL TERM, April 1, 1867. *Leonard, Ingraham and J. C. Smith, Justices.*]

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OSGOOD and others, receivers of the Columbian Insurance Company, *vs.* LAYTIN and others.

Independent of the act of the legislature of 1858, chapter 314, authorizing receivers to treat as void all acts done in fraud of creditors, and making the parties liable to the receivers for the same, receivers of corporations have authority to sue for all moneys due to the company, and for all property improperly disposed of in violation of the rights of either creditors or stockholders, for the purpose of paying the debts and dividing the surplus, if any, among the stockholders.

An action may be maintained by the receivers of an insolvent corporation against individuals, some of whom are stockholders and some of whom are creditors of the company, to recover from the stockholders a dividend declared on its capital stock and received by them; where it is averred in the complaint that such dividend impaired the capital; that some of the defendants, as creditors, are suing the stockholders to recover from them such dividends; and that the funds so misappropriated are required to pay the debts of the corporation.

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Osgood v. Laytin.

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THE plaintiffs, as receivers of the Columbian Insurance Company, an insolvent corporation, sue the defendants, some of whom are stockholders, and some are creditors of that company, to recover from the stockholders a dividend declared on its capital stock and received by them. It is averred that such dividend impaired the capital, and that some of the defendants, as creditors, are suing the stockholders to recover from them such dividends. The complaint asks for an injunction against the creditors, and a judgment against the stockholders for the dividends received. The present case arises on a demurrer of some of the defendants, to the complaint. The demurrer was overruled, and the defendants appealed.

*D. D. Field*, for the plaintiffs.

*E. T. Gerry*, for the defendants.

*By the Court*, INGRAHAM, J. The defendants, who have appealed, concede that the action is properly brought against the creditors, and also that the receivers are the only persons who can collect the assets of the corporation for the benefit of the creditors, but they contend that the complaint is insufficient; first, because the dividend sought to be recovered was paid out of the capital, and therefore was a misappropriation and not a dividend; and, secondly, that moneys so misapplied can only be recovered in cases of fraud, and there is no averment of fraud in the complaint. The grounds of the first objection are, that the section of the statute of 1849, (*sec.* 20,) which authorized creditors to recover dividends contemplated only dividends paid out of the profits, and was not designed to authorize them to bring such actions for the wrongful payment of any part of the capital stock.

Directors of moneyed corporations are prohibited from making any dividends, except from surplus profits, (1 *R. S.* 589, § 1,) and insurance companies are moneyed corporations. (1 *R. S.* 599, § 51.)

The same, at section 4, directs losses sustained by a corporation that exceed its profits to be charged as a reduction of the capital stock, and forbids making dividends until the deficit is made up.

The act of 1858, chapter 314, authorizes receivers to treat as void all acts done in favor of creditors, and makes the parties liable to the receivers for the same.

Without this statute, the receivers, by virtue of their general powers, have authority to sue for all moneys due to the company, and for all property improperly disposed of in violation of the rights of either creditors or stockholders, for the purpose of paying the debts and dividing the surplus, if any, among the stockholders.

The case of *Butterworth v. O'Brien*, (39 Barb. 192,) was an action against the president of the corporation, seeking to recover from him for wrongful acts charged against him, one of which was paying illegally dividends to the stockholders. It was there said that the receivers could not collect for such wrongful acts for the benefit of the stockholders. That case was, however, decided on other grounds. If the receivers have power to collect the assets improperly disposed of, it is not necessary to aver fraud in the disposition of them. The complaint here avers that the dividends were paid entirely out of the capital, which was then impaired so as to be insufficient for the payment of the debts of the corporation without a return of such dividends. This payment was contrary to the statute, and the stockholders receiving them were liable to creditors.

I am inclined to think such an action may be maintained by the receivers where the funds so misappropriated are required to pay the debts of the corporation. If the object was to divide the same among the stockholders solely, it might be otherwise.

The judgment should be affirmed, with costs.

[NEW YORK GENERAL TERM, April 1, 1867. *Leonard, Sutherland and Ingraham, Justices.*]

WILLIAM H. MCGROBY and JAMES TIGHE, plaintiffs in error,  
*vs.* THE PEOPLE, defendants in error.

On the trial of an indictment for robbery, the defense was an *alibi*. The evidence of two witnesses tended to show that when the crime was committed, at half past ten o'clock in the morning of July 30th, the prisoner was at home, at his mother's house, in bed. The judge, in charging the jury, substantially told them that it was for them to determine whether they believed the witnesses who had testified to the *alibi*; that it was singular that a boy like the prisoner should be in bed from seven to half past eleven in the morning, in July, unless he was sick, or there was some other special reason; and that the circumstance that neither his mother, nor any one of his family, had been called to show that he was sick, or to explain the fact of his thus being in bed, might or "would probably turn the scales."

*Held* that, looking at the whole charge, the inference was that the judge meant, and that the jury understood him as meaning, that on the question as to the credit they would give to the witnesses who had undertaken to prove an *alibi*, the circumstance mentioned by the judge might or probably would turn the scales. And that the language, though strong, afforded no ground for granting a new trial.

The judge, in his charge, also said: "A crime of this kind is generally perpetrated at night, but this was in broad day light, at half past ten o'clock, in one of our public thoroughfares; a child with money in his pocket, taken up and carried in an alley, knocked down, robbed and left. If they are guilty, they deserve a severity of punishment greater than any punishment that has been imposed this term, on any person tried. There in some excuse at night, when an attack of that kind is made, but it is a *much graver offense, and requires graver consideration where they are so desperate as to make it in broad day light.*"

*Held* that there was no error in this; that it was plain the judge merely meant to say, and in substance did say, that to commit a robbery like that with which the prisoners were charged, in broad day light, &c. showed a greater boldness, hardihood or recklessness in crime, than committing a like robbery under cover of the night.

**E**RROR to the New York general sessions.

*Henry L. Clinton*, for the plaintiffs, in error.

*A. Oakley Hall*, (dist. att'y,) for the people.

*By the Court*, SUTHERLAND, J. The plaintiffs in error were indicted for robbery in the first degree. They were tried

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in the New York general sessions, before the city judge. Thomas Miller, the complainant, a lad sixteen years of age, testified to the circumstances of the robbery, and testified positively to the identity of the prisoners as the persons who committed the crime. The evidence of Peter Garvey, a boy ten years of age, tended also strongly to show that the prisoners were the persons who committed the crime. The crime was committed about half past ten o'clock in the forenoon of the 30th of July, in 17th street, between 8th and 9th avenues.

The defense, as to both prisoners, was an *alibi*. The evidence of two witnesses, Elizabeth Sherlock and Ellen Brady, tended to show that when the crime was committed McGrory was at home, at his mother's house, in an alley opening on 16th street, between 8th and 9th avenues, in bed. The evidence of Hugh Campbell tended to show that Tighe was at Weehauken, when the crime was committed. As to McGrory, the question was, whether his two witnesses to prove an *alibi* had told the truth. I infer from the error book, that both the prisoners are lads, or quite young men. It appears to have been an undisputed fact, that the boys, or lads, that committed the robbery, being pursued, immediately ran down 17th street into 9th avenue, and down the avenue to 16th street, and turning the corner of 16th street, disappeared in Mrs. Grory's alley.

The city judge, in charging the jury, substantially told them that it was for them to determine whether they believed the witnesses who had testified to the *alibi*; that as to McGrory, it was singular that a boy like him should be in bed, in July, from seven to half past eleven in the morning, (as one of his witnesses had testified he was, on the morning of the 30th of July, when the robbery was committed,) unless he was sick, or there was some other special reason, and that the circumstance, that neither his mother nor any one of his family had been called to show that he was sick, or to explain the fact of his thus being in bed, might or "would probably

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turn the scales." The prisoner's counsel excepted to this portion of the charge.

Looking at the whole charge, I think the inference is, that the judge meant, and that the jury understood him as meaning, that on the question as to the credit they would give to the witnesses who had undertaken to prove an *alibi* as to McGrory, the circumstance mentioned by the judge might, or probably would, turn the scales. The language of the judge was undoubtedly strong, but if my interpretation of it is correct, I see no ground for granting a new trial because he used it. It appears to me, that under the general circumstances of the case, the circumstance mentioned by the judge might legitimately be considered by the jury on the question as to the *alibi* as to McGrory, and if the jury had a right to consider that circumstance, of course it might turn the scales on that question, for the jury might give such *weight* to it, as they thought proper.

The judge, in his charge, also remarked as follows: "A crime of this kind is generally perpetrated at night, but this was in broad day light, at half past ten o'clock, in one of our public thoroughfares; a child with money in his pocket taken up and carried into an alley, knocked down, robbed and left. If they are guilty, they deserve a severity of punishment, greater than any punishment that has been imposed at this term on any person tried. There is some excuse at night, when an attack of that kind is made, but it is a *much graver offense, and requires graver consideration where they are so desperate as to make it in broad day light.*"

The prisoners' counsel excepted to this part of the charge, as if the judge had intended to charge that robbery in the day time was a higher statutory crime than robbery in the night time. But it is plain, I think, that the judge merely meant to say, and in substance did say, that to commit a robbery like that with which the prisoners were charged, in broad day light, &c. showed a greater boldness, hardihood or recklessness

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in crime, than committing a like robbery under cover of the night. The error book showed no other exceptions; and I think the judgment should be affirmed, and a new trial ordered.

[NEW YORK GENERAL TERM, April 1, 1867. *Leonard, Sutherland and Ingraham, Justices.*]

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### SNOW and others vs. THE COLUMBIAN INSURANCE COMPANY.

Where a policy of insurance upon a vessel contained a warranty not to use any ports in the British North American provinces, except between the 15th of May and 15th of August; *Held* that the warranty was broken by sailing on a voyage from Boston to a prohibited port, on the 24th of September, when the vessel was lost before reaching the port. LEONARD, J. dissented.

A fair construction of such a contract would seem to require that the prohibition to use certain ports was intended to guard against the dangers incurred in reaching them; and where the sole object of a voyage was to do an act forbidden by the policy, the insurer should not be held liable for any loss connected therewith. *Per* INGRAHAM, J.

THE defendants insured the schooner *Caspian* for one year, from 9th of September, 1864. The policy contained a warranty not to use ports in the British North American provinces, except between the 15th day of May and 15th day of August. On the 20th September, 1864, the schooner sailed from Boston, bound for Lingan, in Cape Breton, Nova Scotia, one of the British North American provinces, for a cargo of coals. On the 24th September, before reaching Lingan, the vessel was wrecked on the coast, near Louisberg, about fifty miles from Lingan. The defendants moved for a nonsuit, which was denied, and the plaintiffs recovered a verdict. The defendants' counsel excepted, and the court suspended judgment, and directed the exceptions to be heard at general term.

*R. H. Huntley*, for the plaintiffs. I. The policy covered the vessel for the whole period and term insured, including

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the time in question. The vessel was restricted from "using ports in the British North American provinces, except between May and August." The loss was in the open sea, by sea perils, and not in any of the excluded ports, and the grounds of exemption claimed must rest on the proposition, that a voyage commenced for one of the excepted ports is equally excluded with a loss *at the port*.

Now, in the construction of the policy, it is to be remembered that this was a *time* policy, embracing the sea risks of voyages from or to any places, and restricted only as its terms specified. As these terms are the language chosen by the insurers, they cannot be extended in their favor by any looseness or ambiguity of expression. The insurers have expressed themselves with great minuteness, using apt expressions adapted to every class of exclusion. Thus—the vessel might not "*use ports on the continent of Europe north of Hamburg,*" but sailing in the open sea, even north of Hamburg, or to a port on an island, was not precluded. So she should not go east of Navarino—thus interdicting the *region* itself without regard to *place*, whether in port or at sea, but covering a voyage, even if intended to a more eastern port, before reaching the meridian of that port. So, too, *ports on the continent of Europe, north of Antwerp, between November 1st and March 1st*, while it limited the *time*, left other *ports* in the *islands* of Europe free, although within the latitude. So, too, the *West India Islands* are excluded, without reference to *ports*. Then, again, in Texas the exclusion applies to *places* as well as *ports*, showing that the exclusion in this particular was not merely of ports but of *places*; embracing a wider range, when intended to be made. So, too, in reference to the Gulf of Mexico, the exclusion was to apply to *foreign ports and places*, leaving our own ports not precluded. So, too, *places* over Ocracoke bar were precluded, although ports in the same latitude are not prohibited. Indeed, it cannot be denied that the policy shows a clear apprehension of the various and specific differences and shades

of difference of risks ; and when it does not, by specific terms, exclude a risk, it must be deemed to leave the general indemnity of the policy unrestricted.

It cannot be said that the exclusion in this policy is of any particular voyage, designated by ports of departure or destination ; for, not only is it a policy having no reference to ports of departure, but its reference to ports of destination is, that such ports are not to be *used*, leaving the ocean otherwise free—covering the vessel while sailing on the high sea, wherever the general words of the policy admit, but simply interdicting the use of *ports*, which cannot be said to be *used* until they are reached. It is not proper to suppose what intentions might have been to exclude the risk of a voyage, had the parties been aware of the necessity for it ; we are limited to what they have actually done, and by the ordinary rules of construction, they must be limited to the words they have actually used.

It cannot be said that the vessel was *using* a port of the British provinces when she was lost ; and that the underwriters, therefore, are liable. (1 *Duer on Ins.* 16, § 15. *Teaton v. Fry*, 5 *Cranch*, 335. *Palmer v. The Warren Ins. Co.*, 1 *Story*, 362. *Notman v. The Anchor Ins. Co.*, 4 *J. Scott*, *N. S.* 470.)

II. Manifestly, a mere prohibition to use certain ports cannot be violated, except by using the ports themselves. Sailing toward them, by them, or near them, is not using them. Even a deliberate intention to use them, should it be found expedient to do so, and thereby to relinquish thenceforth all protection from the insurance, would not constitute a breach of such prohibition in a time policy like this, having no reference to particular trades or voyages. (*Middlewood v. Blakes*, 7 *T. R.* 162, *opinion of Lawrence, J.* *Tasker v. Cunningham*, 1 *Bligh's P. O.* 99.)

Much less should such an intention, formed by the master in ignorance of the restriction, be so regarded. A prohibition of voyages or passages, to particular ports, is much more com-

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prehensive than a prohibition to use such ports. One underwriter might insure a vessel generally on time, excepting the use of a particular port, and another might thereupon insure whilst using such port. In such a case, the respective termini of the two risks would be clearly defined ; there would not be a double insurance at any point of time ; and, taken together, the two policies would afford a complete protection to the ship-owner, whilst engaged in trade with the port referred to.

It can hardly be supposed that a departure by the schooner from Galveston, on May 14th, 1865, bound on a voyage to Langan, would ever be relied upon as a discharge by the underwriters. In such a case, the vessel could not, by any possibility, reach the entrance to the latter port so as to use it within the prohibited period, or even become exposed, at any time during the prohibited period, to the peculiar dangers resulting from the fogs, ice and winds, which then prevail along the coast of the British North American provinces. The voyage would not be within the letter of the prohibition, nor would it be within any presumable motive or purpose of the underwriter in imposing it.

III. Unless voyages or passages to the British North American ports are prohibited, by the direct force and effect of the words employed, there is no sufficient ground for inferring, from the reason of the thing, a prohibition against *sailing near them in going along that coast*. A voyage from Eastport, in Maine, to Scotland, to the Orkneys, or even to Iceland, is not prohibited at any season.

I am not aware that it is a fixed and uniform rule of navigation, and as such, binding upon the insured, that in voyages from America to Great Britain, or to points north of it, undertaken during the period indicated by this prohibition, vessels should take what is called the Southerly passage. But if such a rule does exist, still, such a voyage as last supposed would, nevertheless, involve considerable exposure to the peculiar dangers of the British North American coast.

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Yet it is not prohibited. For this and other reasons it would seem that, independently of the direct effect of the language employed, no general reason as to the presumable purposes of the restriction, or probable expectations and intentions of either party, should be permitted to influence the construction of this warranty ; as in *Notman v. The Anchor Ins. Co.* (4 *J. Scott, N. S.*, 470 ;) and as in 2 *Bing. N. C.* 383 ; 2 *Mauls & S.* 111 ; 2 *Taunt.* 423, and a multitude of other cases, the precise import of the words found in the policy furnishes the rule of decision between the parties, there is, in this case, no other reliable guide.

The verdict should be sustained.

*D. D. Field*, for the defendants. I. The warranty against the "use" of ports in the British provinces prohibits voyages to any of those ports. The whole clause relating to the warranty is in these words :

"Warranted not to use ports on the continent of Europe north of Hamburg, nor to go east of Navarino in the Mediterranean during the period insured ; nor ports on the continent of Europe north of Antwerp, between 1st November and 1st March ; nor ports in the British North American provinces, except between the fifteenth day of May and fifteenth day of August ; also, warranted not to use the West India Islands during the months of August and September ; also, warranted not to use ports and places in Texas, except Galveston ; nor foreign ports and places in the Gulf of Mexico ; nor places on or over Ocracoke Bar ; nor any of the West India salt islands ; nor ports or places on the west coast of America north of Benecia, during the period insured ; nor to use Min river ; nor Torres straits."

What is the meaning of the prohibition not to *use* certain ports or places ? Does it mean only that the insured shall not *shelter* or *moor* his vessel in the prohibited port ? A vessel uses a port when she finds shelter and anchorage in it. That is in the strictest sense the *use* which a vessel makes of a

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port. This, however, is obviously not the sense of this warranty, for there is no danger in the *shelter*, but in getting to it. The attempt to reach the port must therefore be the thing prohibited. When does this attempt begin? Clearly when the vessel starts for the port. It will not do for the courts to interfere and say there is no danger in the first part of the voyage to the prohibited place, but only in the latter part of it. Parties make their own contracts. They might in the present case have stipulated that the vessel should not actually *enter* certain ports. That might or might not have answered their purpose. If the dreaded danger was from pirates in the harbor, or sea-worms bred there, such a stipulation would have been sufficient. If, however, shoal water made the danger, the stipulation might be against attempting to cross the bar. If it were the dangers of particular latitudes to be guarded against, the language might have been so framed. Instead of this, instead of varying the expression to cover different dangers, one general expression was used, which must have a uniform interpretation, and broad enough to cover all the dangers. The one chosen was "use," and the prohibition against the use of certain ports or places must be so understood as to exclude any movement towards those ports.

If we analyze the warranty, and take it apart, we shall find that certain portions of it must have that interpretation, or else they will be senseless. Thus the warranty "not to use ports on the continent of Europe north of Hamburg," could not be so construed as to permit the vessel to sail all round the Baltic, even to the northwest limit of the Gulf of Bothnia, and yet prohibit her anchoring at Copenhagen. Then the warranty "not to use ports on the continent of Europe north of Antwerp, between 1st of November and 1st of March," must mean that the vessel shall not sail for such ports. Otherwise, she might beat about all winter in the stormiest seas of the north, and yet be forbidden to seek shelter in Bremen or Hamburg. The warranty "not to use the

West India Islands during the months of August and September" was plainly intended to exclude the insured vessels from the region of hurricanes in the worst season.

So in the present case, the warranty "not to use ports in the British North American provinces, except between the 15th day of May and 15th day of August," must have been required because of the danger from ice and storms during the harsher months of the year. This ice and these storms would be, however, less dangerous in port than out of it, and, therefore, that construction would be absurd which would allow a vessel to cruise in these northern latitudes and hover on these rocky coasts, but exclude her entering into the ports. The prohibition to use a particular port means that going to that port should not enter into the plans of the insured. *He is to make no movement with the view of entering it.* Good faith requires this. The insurer should not be subjected to the hazard of attempting to prove that the loss happened in consequence of this plan. The argument should be held conclusive that the vessel might not have been in the place where the loss occurred, but for the scheme intended to end in entering the prohibited port.

The rule as to voyage policies may serve to illustrate the principle which should be applied here. There the beginning of a voyage, intended to terminate at a place different from that mentioned in the policy, makes the voyage a different one, though the lines of the two coincide for the greater part of the distance, and a loss any where cannot be recovered. The *attempt* to enter a prohibited port is begun when the vessel *starts* with the intention of entering that port. The intention with which a voyage is begun, determines its character. To start with the intention of entering a prohibited port, is an attempt to enter that port, and is *using* it, in the sense of the policy.

II. The departure of the vessel in this case for the port of Lingan, its presence upon the coast of Nova Scotia, and its attempt to enter the prohibited port, were each of them

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a breach of the express warranty not to use such ports. This exonerates the insurer. It is well settled, that the breach of an express warranty, whether material or not, has this effect. (2 *Pars. on Mar. Law*, 104. *Newcastle Ins. Co. v. Macmorran*, 3 *Dow*. 255. *Blackhurst v. Cockell*, 3 *T. R.* 360. *De Hahn v. Hartley*, 1 *id.* 343. 2 *id.* 186.)

III. The verdict should be set aside, and a new trial ordered.

INGRAHAM, J. The sole question in this case is whether the warranty not to use any ports in the British North American provinces, except between the 15th May and 15th of August, was broken by sailing on a voyage from Boston to a prohibited port on 24th September, when the vessel was lost before reaching the port.

I have to some extent examined this question in *Bearns v. The Columbian Ins. Co.*, decided this term, (a) but that case differs from this in the fact that here the loss occurred during the voyage from Boston to the prohibited port, while in the other case the damage happened in going in and out of a port within the terms of the policy.

This was a time policy, and the prohibition was against the use of those ports, and under ordinary circumstances, if the voyage had been from Boston to some port in Europe the same route might have been taken and the vessel would have been covered by the policy. On such a voyage, the prohibition not to use the ports in the British North American provinces would be properly construed to mean that the vessel should not enter these ports, and that a mere intent to enter them would not violate the policy.

In this case, however, it is argued that the whole voyage was undertaken with an express intent to violate the warranty, and that such an intent from the commencement of the voyage led to a route nearer to the shore and exposed the vessel to greater danger, and that the vessel would not have

(a) *Ante*, p. 445.

been where she was lost, but for the intended plan to enter the prohibited port. Thus in voyage policies, the policy ceases to cover the vessel at the point of divergence for the prohibited port.

The question is not free from difficulty. Ordinarily the term use a port, means to enter it, and until that takes place the port is not used and the warranty is not broken. But where the sole object of a voyage is to use a prohibited port, and in consequence thereof the vessel is wrecked upon the same coast within a short distance of the port intended to be used, the risk is undoubtedly increased, and in a way in which the insurer intended by the warranty to be protected against.

The question in this case has been lately examined in the Court of Appeals of this state in *Stevens v. The Commercial Ins. Co.*, (26 N. Y. Rep. 397.) There Davies, J. in deciding the case applies to it the rules applicable to voyage policies, and says: "In whatever aspect the case can be considered, it seems to be well settled that after the brig left the port of Laguira (not a prohibited port) to proceed to that of Sisal (which was prohibited) she ceased to be under the protection of the policy, and the underwriters were discharged. It was *entering* on a voyage not covered by the policy."

If this rule is correctly applied to time policies, then the sole object of the voyage in the present case being to enter a prohibited port, after the schooner entered on the voyage to Langan she ceased to be under the protection of the policy and the plaintiffs cannot recover.

There is another view of this case which ought to have some weight in its decision. The clear intent of the underwriters in this restriction is to guard against the danger which arises from navigating near the coast of the British provinces at certain seasons of the year. That intent is completely frustrated, if the insured can go to a prohibited port, and claim protection in going and returning, and being unprotected only while in the port. It is a fraud on the under-

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writers, and as was said by Cowen, J. in *Union Ins. Co. v. Tyssen*, (3 Hill, 118.) "The voyage is undertaken in fraud of the policy."

A fair construction of the contract between these parties would seem to require that the prohibition to use certain ports was intended to guard against the dangers incurred in reaching them ; and where the sole object of a voyage was to do an act forbidden by the policy, the insurer should not be held liable for any loss connected therewith.

The verdict should be set aside and a new trial granted, costs to abide event.

SUTHERLAND, J. concurred.

LEONARD, J. I dissent. The policy was not violated by an intent of the owner to violate it at a future time. It is the actual entry or use of the port that violates the contract.

In the case of *Stevens v. The Commercial Ins. Co.*, the warranty was violated by an actual entry of, and an anchorage at Sisal, a prohibited port. I think that case has no application here.

New trial granted.

[NEW YORK GENERAL TERM, April 1, 1867. *Leonard, Sutherland and Ingraham, Justices.*]

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THE PEOPLE OF THE STATE OF NEW YORK vs. THE  
CENTRAL RAILROAD OF NEW JERSEY.

When a foreign corporation, by its officers, comes within this state, it becomes subject to the laws of the state, and to the process of the courts ; and where such a corporation, by its officers, is guilty of a wrong, or commits a trespass, within the state, the corporation cannot escape the consequences of its illegal acts, by setting up that it holds its existence under a foreign government.

Where a complaint in behalf of the people of this state against a foreign corporation, shows a claim of title to, and jurisdiction over, certain waters, by

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the plaintiffs; that the defendants have taken possession, and are by their officers still in possession, and without authority, this is sufficient to give jurisdiction, if the process can be served on the defendant. If there is an improper service, that must be remedied by motion.

The grant to the state of New York, by the third article of the compact or treaty between that state and the state of New Jersey, made in 1838, of exclusive jurisdiction over all the waters of the bay of New York, and all the waters of the Hudson river, and of and over the lands covered by said waters, to low water mark on the New Jersey shore, subject to the right of property therein granted to New Jersey, conferred upon the state of New York full power and authority to preserve the river and bay from injury by encroachments from strangers acting without authority.

The jurisdiction given to the state of New York, by that article, is not the mere right to serve process either civil or criminal, but is the jurisdiction granted by one sovereign power to another; and in that sense it means the right of exercising authority—of governing and controlling.

The exclusive jurisdiction in the state of New York, over the waters of the Hudson river, and over the land under the water, gives a right of property therein, sufficient to maintain an action for an encroachment thereon, by erecting docks and piers connected with the main land; notwithstanding the fee of a portion of the land is vested in the state of New Jersey.

Where, in an action brought by the people of the state of New York against a foreign railroad corporation, it appeared from the pleadings that the defendants had taken possession of a tract of land under water, in the bay of New York, and the Hudson river, displaced the water by filling in the same to the extent of eight hundred acres, in a portion of the bay and river over which the state of New York has exclusive jurisdiction, and were engaged in filling in to a larger extent, and would cause serious damage to the harbor of New York; and that they were so doing without any right, and without any grant or permission from the plaintiffs; and by their admissions the defendants appeared as simple wrongdoers and trespassers, committing a serious injury to the rights of property of the plaintiffs; *Held* that it was a proper case for restraining them, by injunction, from doing further wrong and damage, until it should appear that they had some right and authority for their proceedings.

The boundaries of the state of New York extend to low water mark on the New Jersey shore; and the county of New York, on its western boundary, extends to the west bounds of the state.

**T**HIS action is brought by the people of the state of New York, against the defendants, to prevent encroachments in the Hudson river, on the westerly side, adjoining the shore of New Jersey.

The complaint avers that the defendants are a body corpo-

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rate under the laws of New Jersey. It then sets out the agreement or treaty entered into between New York and New Jersey, as to the rights of each to the land and water in the Hudson river, south of Spuyten Duyvel creek, and avers that the defendants, without any permit or authority from the plaintiffs, and without any right, have for five years last past, and upward, been infringing, encroaching upon and violating the jurisdictional rights of the plaintiffs, and obstructing the navigation of the waters of the Hudson river and the bay, by taking possession of and appropriating to its own exclusive use about eight hundred acres of the land and water lying west of the middle of the waters of the bay of New York and Hudson river, over which the plaintiffs have exclusive jurisdiction. That the defendants have displaced the waters over the land by erecting docks and piers, and filling in the same, and have connected the same with the main land of New Jersey by a wooden trestle work about one mile in length. It further alleges that this part of the Hudson river and the bay are arms of the sea, in which the tide ebbs and flows; that previous to the filling, the natural depth of the waters was from one to twenty-four feet, and was actually navigable by vessels of the largest size, and would be so in many parts of such filling. It charges that the filling is made with materials affecting injuriously the sanitary condition of the inhabitants, and that such structures form a common and public nuisance by narrowing the channel of the river and bay, and obstruct the use of the waters, and as such nuisance they ask an injunction against its continuance and extension.

To this complaint, the defendants demurred, upon the grounds:

1st. That it appears from the complaint, that the court has no jurisdiction of the defendants.

2d. That the court has no jurisdiction of the subject of the action.

3d. That the complaint does not state facts sufficient to constitute a cause of action.

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The case was heard at special term, before Justice POTTER, who gave judgment for the defendants, and the plaintiffs appealed to this court.

*J. H. Martindale*, (attorney general,) for the appellants.

I. The defendant is a corporation, organized under the laws of New Jersey. 1. As such corporation it has entered the bay of New York and Hudson river, opposite the southerly extremity of the wharves of Jersey City; has driven piles and constructed thereon a tressle work, intruding into the bay about one mile; has laid a railroad track on such tressle work; has driven piles around an area of about 800 acres at the termination of such tressle work; has filled in portions of that area with the debris of Jersey City and New York, and elevated the made ground above the waters of the bay, and throughout that space has infected the air, impeded navigation and destroyed the fisheries. 2. All these acts have been done without the consent or authority of the people of this state. 3. Assuming that these acts have been committed in a harbor of this state, which is an arm of the sea, where the tide ebbs and flows, they present a plain case of nuisance, *purpresture*, on public rights and property. As such, they may be enjoined by the courts of equity. (*Lansing v. Smith*, 8 Cowen, 116. *Angell on Tide Waters*, 64. 2 *Story's Eq. Juris.* § 921. *Att'y Gen'l v. Cohoes Co.*, 6 *Paige*, 133.)

II. The case does not involve the point of *repugnancy* to the constitution of the United States, because it cannot be claimed that the United States has assumed any jurisdiction over the place in question, contravening the right of the state to interfere, and preserve the rights of the people against interruption. (*Wilson, dec. v. Blackbird Creek Marsh Co.*, 2 *Peters*, 245.) This was an action of trespass *vi et armis*, for injury to a dam constructed across a creek, entering the Delaware where the tide ebbed and flowed. The erection of the dam was authorized by an act of the legislature of the state of Delaware.

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The act was questioned as being repugnant to the constitution of the United States. Held not repugnant.

III. The place in question is conceded to be situated on land, the property right of which is in the state of New Jersey. 1. Although the property right in the land is vested in New Jersey, it cannot be claimed that there is attached thereto a right to exclude citizens of the United States, and of the state of New York in particular, from the enjoyment of all the easements and navigation rights which pertain to the bays and public waters of the United States. (*Mississippi R. R. Co. v. Ward*, 2 Black, U. S. 485.) The public right in this respect is not abated by the several ownership of the land under the water. The question of territorial boundary will affect the remedy in the courts, but not the intrinsic character of the right. (*Id.*) 2. In the present case, the impediment to jurisdiction, which arose in Ward's case, is obviated and removed by the very means suggested in the opinion of the court as adequate for that purpose.

IV. It thus appears that a public nuisance exists by the act of the defendants, cognizable and *removable* by a state court of equity.

And the remaining question is whether the allegation that the act has been done without the consent and authority of the people of this state is sufficient to give jurisdiction, and to complete the statement of a cause of action.

Suppose the consent of New Jersey as the proprietor of the land under water, *without* the consent of New York, is sufficient to authorize the defendants' structures, would the complaint be sufficient? It might be answered, that the act, being in its nature a *purpresture* on public rights, and within the jurisdiction of New York, it is necessary to plead the license or authority derived from New Jersey. But it will be more satisfactory to show, that New Jersey cannot give such consent, by reason of her proprietary right in the soil. 1. The right of New Jersey is a mere right of property. Jurisdiction which, when applied to states, describes the attribute of sove-

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reignty, is expressly separated from her right of property, and vested exclusively in New York. 2. In our complex system of state governments, subordinated to a common and general government, the instances are and must be frequent, where the rights of property held by one state are dissevered from jurisdiction or sovereignty, which are recognized and vested in another state. (*Compact between New York and Massachusetts, cited in Fellows v. Denniston*, 23 N. Y. Rep. 424.) 3. This is true of the government of the United States, when the case arises in which, within the limits of a state, the United States acquire a right of property for some public use, not requiring the exercise of governmental jurisdiction.

“The purchase of lands by the United States for purposes within the territorial limits of a state, does not of itself oust the jurisdiction or sovereignty of such state over the lands so purchased.” (*U. S. v. Cornell*, 2 Mason, 60.) This will be especially the case where, in the western territories, new states are formed and put in operation long before the public lands have been sold and become vested in the ownership of private parties. 4. Exclusive jurisdiction, being the attribute and definition of sovereignty in a state, includes all power and rights, other than the mere right of property, held subject to such jurisdiction, whether held by a state or a citizen. 5. *Pro hac vice*, the right of property in New Jersey to the land in question, is qualified and restrained by the sovereign jurisdictional rights of New York. All that New York has parted with, all that New Jersey has assumed to acquire, is a property right *dissevered* from all authority as a sovereign—all jurisdiction as a state—in other words, all power to make laws, or legislate for, or govern or exercise authority over, the place in question, except the regulation of the fisheries, but such regulations must be so made as not to obstruct or hinder navigation. 6. In this particular case, the acts of the defendants tend to impair the territorial rights and boundaries of New York. If this process of filling up the bay of New York may be continued on the westerly side of the centre of the

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Hudson river, the present boundary line, defined by the low water mark on the western shore, will be obliterated. In effect, the territorial boundaries of New York are defined by the low water mark on that shore, along the Hudson river and upper bay of New York. This is not changed by the compact of 1834. The boundary line in the center of the river and bay is expressly modified by "*exceptions*." The language is explicit; "The boundary line between the two states," &c. "shall be the middle of the river—of the bay of New York," &c. "*except as hereinafter otherwise particularly mentioned*." The only exception thereafter particularly mentioned, affecting this part of the line, is found in the reservation of the jurisdictional rights of New York, which are extended to low water mark on the Jersey shore. The territorial boundary between states defines the common dividing limits of their respective jurisdictions. Burrill's Law Dictionary, title Jurisdiction: The jurisdiction of a state is defined to be "the power to make laws—power to legislate or govern—power or right to exercise authority." Again, in Wildman's International Law, p. 40, "the rights of sovereignty extend to all persons and things not privileged within the territory." *Id.* 60: "The independence of states is inconsistent with the claim of any foreign potentate to exercise any jurisdiction or authority within their territories without their consent. The authority of a state within its own territories is absolute and exclusive. It is susceptible of no limitation not imposed by itself. Any restriction upon it deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in the power which could impose such restriction." "It is not easy to conceive a power to execute municipal law, or to enforce obedience without the circle in which that law operates. A power to seize for the infraction of the law is derived from the sovereign, and must be exercised within the limits which prescribe the sovereign's power." (*See Rose v. Himely*, 4 Cranch, 278.) "Bynkershoek, ac-

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cordingly, confines the jurisdiction of a state to persons and things within its territory, or to its subjects in a foreign country, so far as the sovereign allows it to operate."

V. The defendants do not attempt to confute the above propositions directly, because it is conceded if the works of the defendant, which the plaintiffs complain of, are within the exclusive jurisdiction of New York, then the complaint against them *may* be sustained. 1. But it is said that the structures complained of as nuisances, although constructed in the bay of New York, are taken out of the jurisdiction of New York by *the act of construction* because (it is said) the right to make such structures is reserved in the compact of 1834, and when the wharves are constructed, they are transferred, by the terms of the compact, to the jurisdiction of New Jersey. 2. This proposition, the plaintiffs deny. The 3d article authorizes improvements, wharves, &c. to be made "*on the shore*," and not elsewhere. Suppose it is conceded (which it is not) that the building of wharves "*on the shore*," will require an extension of the wharves beyond low water mark, in order to reach water of sufficient depth to float vessels of such tonnage as would be expected to navigate the bay of New York. That construction, cannot by any fair intendment, authorize the building of wharves, *far out into the bay*, entirely dis severed from the *shore*, and only accessible by a bridge of "tressle work," one mile in length. 3. With such concession, at *most*, this article could only be construed to permit the construction of wharves "*on the shore of New Jersey*," just as that shore existed at the time of the compact. It cannot, by any fair intendment, be construed to authorize the building of "*artificial shores*" far extending into the bay, and the obliteration of the bay, by filling it with earth, to the extent of human power, and planting thereon a city. 4. These acts are encroachments on the rights and jurisdiction of New York, and ought to be prohibited. If this be true, there can be no doubt of the jurisdictional authority of the Supreme Court of New York.

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Whether that court, or the United States Court, shall be applied to, must be confided to the discretion of the attorney general of the state. 5. The above argument disposes of the technical objection, that it does not appear that this court has jurisdiction of the person of the defendant. If the complaint shows that the structure complained of was within the jurisdiction of New Jersey, brought within that state by the very act of making the structure, it would be needless to raise the preliminary objection, of want of jurisdiction of the defendant's person, and it is a sufficient answer to the objection, to say that the same argument which disproves that New Jersey has a right, under the compact, to build wharves far out into the bay, a mile distant from the "shore," disposes of the technical objections, raised to the jurisdiction of the court, because it proves that the property and structures of the defendant are actually within New York.

VI. But it is argued that civil jurisdiction cannot be extended beyond the territorial limits of the state, and that the territorial limits of New York are confined to the middle of the river and bay, *except* in respect to the islands named in the 2d article of the treaty or compact of 1833. We answer, on behalf of the state of New York, that this argument of the defendants contains in the "exception" which it allows, (and which it is plain could not be avoided) an admission fatal to the whole argument. 1. What is the exception in the 2d article, which places the "*islands*" referred to within the territorial limits of New York? They are declared to be within the "*exclusive jurisdiction*" of New York. If "*exclusive jurisdiction*" *ex vi termini* brings the *islands* within the *territorial* limits of New York, what ingenuity of argument can prevent the same "*exclusive jurisdiction*" from bringing the upper bay of New York within the same territorial limits? It is abundantly proved that the right of property in the land does not confer *jurisdiction*, or in other words, *sovereignty*. 2. But the whole

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argument confronts the plainest terms of the compact, viz. "*exclusive jurisdiction*," clearly, unmistakably contained in New York. The language of the 6th and 7th articles shows that it was supposed, when property was taken, or persons escaped into the "*exclusive jurisdiction*" of New York, they were "*out of the state*" of New Jersey.

VII. It was conceded in the court below that the police jurisdiction ceded to New York by the compact, included subjects of "*quarantine and commerce*." 1. This concession is fatal to the defense. The commercial necessities of New York demanded that she should give law exclusively to the upper bay. The act complained of is destructive to the bay in a material degree. How can it be shown that the rights of New York, included in these commercial interests, connected with the use and government of the bay, are not invaded, when a portion of the bay, a mile in extent, navigable for vessels of 300 tons burthen, is inclosed with piles and debarred from commercial use and control, and jurisdiction by New York?

SUPPLEMENTAL POINTS. Since the preparation of the foregoing points, the argument or opinion of Justice Potter has been furnished by respondent's counsel. This opinion was not prepared when the appeal in this case was made and the appeal papers were printed.

Four propositions are stated by Justice Potter as the law of this case, viz :

1. The courts of this state have no jurisdiction of the question and subject matter of this action, because in effect the disputed question is one of boundary between two sovereign states, and there is no authority to make the state of New Jersey a party to the action.

2. The territorial limits of New Jersey extend to the middle of the Hudson river and the bay of New York, and embrace the *locus in quo*; and the courts of this state have no

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jurisdiction to adjudicate and enforce its judgments within the territory of another sovereign state.

3. *Non constat*, the *locus in quo* is between high and low water mark on the New Jersey shore, although it is alleged in the complaint, and therefore admitted by the demurrer, that the whole area is included within the territory, over which exclusive jurisdiction is given to the plaintiffs by the third article of the agreement between New York and New Jersey ; that it was part of the Hudson river, and actually navigable in most parts thereof by vessels of the largest size, and would be navigable for vessels of three hundred tons burden and under, were it not for the structures of the defendants.

4. The term "*shore*," as expressed in the said agreement, means *wharf line*, or as far out into the river and bay as New Jersey may find it practicable and may choose to extend wharves.

I. The first proposition is not founded in fact. This suit is not brought to settle the boundary line between the states of New York and New Jersey. That was settled by the compact of 1834. Can it be plausibly claimed that the courts of New York, within her own territory as defined by that compact, cannot abate public nuisances, nor enforce the laws of New York against private persons ? The object of the suit is expressed in the prayer for relief, viz. to abate a public nuisance. Will the mere allegation by the defendant, that the *locus in quo* is without the territory of the state, deprive its courts of all authority to consider the question of territory and to abate the alleged nuisances if the allegation should prove untrue ? (*N. Jersey v. N. York*, 5 *Peters*, 283.)

II. The second proposition of the learned justice, it is respectfully submitted, contains the error which pervades his whole opinion. He confounds the boundary line which divides the *property* rights of the two states in the *land* under water with their respective *territorial* limits. 1. The boundaries of the state are defined in the 1st section, 1st title, 1st chapter, and part 1st of the Revised Statutes. Its jurisdiction is de-

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clared in the second title. These boundaries must be recognized by our own courts at least, whatever may be the action of the courts of New Jersey. In this part the boundaries, both of property and jurisdiction, are defined as follows: From "a rock on the west side of Hudson's river, in the latitude of 41 degrees north, marked by said commissioners; then southerly along the west shore, at low water mark of the Hudson's river, of the Kill Van Kull, of the Sound between Staten Island and New Jersey, and of Raritan Bay to Sandy Hook." 2. The first article of the compact of 1834 defines the middle of the said river, kill, sound and bays as the boundary line, "*except as thereafter otherwise particularly mentioned.*" The words "boundary line" do not recur in the whole compact, and if the important qualifications contained in the succeeding articles do not affect the boundary line, as it relates to territorial or jurisdictional limits, then the exception contained in the first article is wholly without meaning. In *Rose v. Himely*, (4 *Cranch*, 278,) above cited, Chief Justice Marshall says: "The legislation of every country is territorial. It is not easy to conceive of a power to execute a municipal law without the circle in which that law operates." "The pacific rights of sovereignty must be exercised within the territory of the sovereign." It follows that every clause in the articles of the compact of 1834, succeeding the first, do relate to and affect the boundary line between the states, so far as that term defines a territorial line. The boundaries of territory and "exclusive jurisdiction" must be the same. Territory signifies "the compass of land within the jurisdiction of a state." (*Bouvier's Law Dictionary. Worcester's do.*) Suppose the islands retained by New York, in the second article, shall be built upon and inhabited, can it be admitted by our own courts that the residents will belong to New Jersey and not to New York? Will they be removed beyond the territory and county of New York? The 5th subdivision of section 2, title 1, chapter 2, part 1 of the Revised Statutes defines the boundaries of the county of

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New York, and extends the south boundary "across the North river, so as to include Nutten Island, Bedlow's Island, Bucking Island, and the Oyster Islands, to the west bounds of the state." (*Senate Journal of 1808, pp. 52 to 92. Id. of 1828, appendix A. §§ 12, 13, 17, title 10, ch. 20, part 1, R. S. Id. §§ 78, 79, art. 4, title 5, ch. 9, part 1. Id. § 11, title 6, ch. 1, part 4.*) But the opinion of Justice Potter places nearly all these islands within the territorial limits of New Jersey.

It is to be recalled, that at the time of the compact New York did extend her jurisdiction in fact as well as boundary line to low water mark on the west shore of the Hudson river—and New Jersey obtained nothing within those limits except what was yielded by the compact. She did obtain four rights. 1. Jurisdiction over wharves made on the shore, and vessels either aground on the shore, or fastened to wharves; except the jurisdiction incident to quarantine and health laws. In other words, vessels either attached to a wharf or grounded on the shore where no wharf was built, were transferred to the jurisdiction of New Jersey. 2. She obtained the exclusive right of property in the land under water west of the middle of the river and bay. 3. She obtained the exclusive right to regulate the fisheries in these waters. 4. She obtained a right to serve process in certain cases, both criminal and civil, within that territory, but this right was qualified with an *express admission*, that the process when executed against property, was so executed *out of the state.* (*Arts. 6 and 7 of Compact of 1834.*) Every one of these rights is consistent with the jurisdiction and sovereignty of New York over the whole territory. Even the jurisdiction given to New Jersey over the vessels grounded on the shore or attached to wharves, was a floating temporary jurisdiction, and did not diminish the exclusive jurisdiction of New York over the territory. Process for assaults, of replevin, and the like, executed and arising within the territory, and not on a vessel actually attached to the shore,

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must still be issued out of the courts of New York, to the same extent as before the compact. In short, the learned justice has committed the grave error of construing a compact or treaty, which is full of the most explicit provisions, to secure the territorial authority of the state of New York over the *locus in quo*, into a surrender and transfer of that authority to New Jersey.

III. The third proposition of the learned justice, viz. that the complaint is defective because the fact is not alleged, that the *locus in quo* is below low water mark, is not technically correct. Even if the objection had been specially stated in the defense, and was well founded, the plaintiffs should have had liberty to amend the complaint. But the complaint is not defective. It alleges as matter of fact, and not of law, that the *locus in quo* is within the area over which by the third article exclusive jurisdiction is given to the plaintiffs, that is, the area of land in the bay of New York and Hudson river, covered by the waters from Manhattan Island "to the low water mark on the westerly or New Jersey side thereof." The learned justice treats this part of the complaint as a claim of "jurisdiction by virtue of the treaty and statute." It is certainly an apt description of the fact, that the place is bounded on the west by the low water mark on the Jersey shore.

IV. But the fourth proposition, if sustained, will be a full and complete justification of the grievances alleged in the complaint. So far as New York is concerned, she will have no right to complain, if New Jersey has physical power, and exerts it to fill up and obliterate the west half of the Hudson river and bay below the forty-first degree of north latitude. The learned justice has decided that the word "*shore*" employed in the treaty, cannot be construed by "literary lexicons" or "according to legal and maritime definitions." The enlarged definition suggested and adopted by the learned justice is, "a place where wharves and docks may be built, and to which vessels may be fastened." 1. It must be con-

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ceded that this definition effectually disposes of all the complaints of New York presented in this case. We complain that a bridge has been extended for the distance of a mile into the bay, and that an area of 800 acres is embraced within these structures, but this definition disposes of the complaint, and expressly confers the right to make the structures, and to exercise exclusive jurisdiction over the whole area embraced by them when made. The plaintiffs insist that the court is not at liberty to substitute this extraordinary and perverted definition of a familiar word for the true one. (*Story on Contracts*, § 639. *Westcott v. Thompson*, 18 *N. Y. Rep.* 363.) 2. If the courts are at liberty to alter and enlarge the plain phraseology of a compact, to subserve the convenience of one party, at the expense of another, then the rules of construction will be involved in irremediable uncertainty and fluctuation. 3. The intention of the compact can be sought in the previous relations and disputes of the parties. New York then claimed and held the property as well as the territorial right in the soil to low water mark on the west or Jersey shore. The landings on that shore, where there were no wharves, were necessarily on the ground; and therefore, before the compact, every vessel aground on the shore, or attached to a wharf, if it extended into the water, afforded a safe refuge from the authority and jurisdiction of New Jersey. This inconvenience was removed by the compact, which recognized equal jurisdiction in New Jersey, over her wharves and shores, and the vessels attached to or aground thereon. 4. But it is a fact that the attention of New Jersey, thirty years ago, was not directed to Jersey city, but to Perth Amboy and Newark for commercial ports. These places, and not Jersey city, were made ports of entry, and they were especially provided for in the compact of 1834, by provisions extending the exclusive jurisdiction of New Jersey to Staten Island in the lower bay, exactly like the provisions which preserved the ancient and necessary dominion of New York over the Hudson river and bay of New York.

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(*Laws U. S. of 1834, § 9, ch. 135. Senate Journal of 1808, p. 71.*)

*L. B. Woodruff*, for the respondents. I. It appears, by the complaint, that this court has no jurisdiction of the defendants. 1. By the express provisions of the statute this is good cause of demurrer. (*Code, § 144.*) It is, therefore, not necessary to plead it (or set it up by answer) in abatement. The demurrer for this cause being now authorized by statute, it does not operate as a *waiver* of the objection, as a general appearance might have done in our former practice. To hold that the defendants, by demurring—setting up the objection—submit to the jurisdiction, is to make this statute a nullity in the face of its express provision, that when this appears upon the face of the complaint the defendants may demur. 2. The complaint states that the defendants are a foreign corporation. This court has no jurisdiction of such a corporation, unless certain facts exist which, by statute, create an exception to the general rule. This results from the general principle that (without express statute making certain facts operate to enable a suit to be brought,) there is no mode of compelling a foreign corporation to appear in our courts. *In re McQueen v. Middletown Manufacturing Co.* (16 *John.* 5,) it was held that a foreign corporation *could not be sued* in this state; and, therefore, that its property could not be attached. The Court of Chancery held that that court had no jurisdiction to attach the property of a foreign corporation: and this decision was affirmed, on appeal. (*Reviser's notes to §§ 17, 30, of Art. 1, Tit. 4, Chap. 8, Part 3 of R. S.*) This led to the statute authorizing attachment as a mode of acquiring jurisdiction, under which, if the corporation chose to appear, "jurisdiction of the person" was acquired, otherwise the proceeding, under the statute, was *in rem* only. 3. The complaint showing that the defendants are a foreign corporation, it shows that this court has no jurisdiction of the defendants, unless it has been gained

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under some statute and by the fulfillment of the *conditions* requisite. *Prima facie*, there is no such jurisdiction. The complaint should show some facts which take the case out of the affirmative rule, and which satisfies the conditions upon which an exception arises. In *Bates v. New Orleans I. & G. N. Railway Co.* (4 Abb. 72,) the Supreme Court, in general term, held, that under the Code it was *essential* to the *acquisition of jurisdiction*, that the foreign corporation owned *property within this state*. When, therefore, it appears by the complaint that the defendant is a foreign corporation, *prima facie not liable* to be sued in our courts, the *essential requisite* to give jurisdiction must be averred. 4. There is no averment of *any facts* which take the case out of the general rule. It is not averred that the defendants have any property within this state. The amendments of the Code (sec. 134 after the decision above cited,) authorizing the commencement of a suit against a foreign corporation where service of the summons "shall be made within this state, personally upon the president, treasurer or secretary thereof," has only created another exception to the general rule. The essential requisites or conditions must still appear to be satisfied, else the *prima facie* want of jurisdiction appears and must prevail. A suit may be commenced by the *service* of a summons. (Code, § 127.) But by § 134 no such service can be made upon a foreign corporation, and, therefore, no action can be commenced, *unless* the conditions before referred to are satisfied. Of this there is no averment. 5. To any suggestion that it is not usual in practice to state, in the complaint, the mode or process by which the action was commenced; and hence an averment that the defendants *have property in the state*, or that the summons was served upon the president, &c., is not necessary; it is answered. The practice was formerly, even in actions against individuals, to declare against the defendant as "in custody, &c." which imported service of a *capias*; or, as having been "duly summoned," which imported service of a summons; or where the defendant was

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sued by service of a declaration with notice to plead, it was usual to refer to the statute, in the declaration, as the ground of declaring against a defendant yet to be served. An omission to make any such statement would be of no importance when it was not ground of demurrer; for, before the Code such a demurrer would, of itself, be a submission to the jurisdiction, and waive the defect. When the complaint does not, on its face, show *prima facie* want of jurisdiction, this court having general jurisdiction of persons and corporations within the state, jurisdiction may be presumed without formal averment of the service of the summons. The present practice, in actions against persons and domestic corporations, may, perhaps, be sustained on such presumption. Be this as it may, no such presumption can arise where it *does appear prima facie* that no such jurisdiction exists.

II. The practical question then is: Has the state of New Jersey the right to make wharves, docks and other improvements along the westerly side of the Hudson river and bay of New York, below Spuyten Duyvel creek; or has that state by voluntary treaty with New York surrendered that right? The bill does not proceed upon the idea that prior to the treaty New Jersey had not this right to the full extent that sovereignty confers it on any state or kingdom bounded by navigable waters. The ground of the complaint is that by voluntary treaty the right has been surrendered. Such consequences, the improbability of any such intention—the obvious breach of fidelity to her own citizens—the fact that it involves a like surrender by New York of the same right along a portion of her territory, and that if it be held that New Jersey cannot build such wharves from her shore, or New York cannot from hers, then such wharves cannot be built at all, since neither can build wharves within the territory of the other; all these considerations forbid such a construction of the treaty, unless its terms are such and so clear as to imperatively require it.

The treaty embraces the right of the respective states in

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the whole extent of the waters and shores, from the northern boundary of New Jersey, to and including Raritan bay. So that whatever right or authority was conferred upon New York, in respect to the waters of Hudson river and the bay of New York, was in like manner, and to the same extent conferred upon New Jersey in respect to the waters of the Sound, between Staten Island and New Jersey, below Woodbridge creek and the waters of Raritan bay. (Article first of the treaty.)

Establishing the boundary between the two states, *ex vi termini*, establishes the *proprietaryship* of the states respectively to the *middle* of the Hudson river, bay of New York, the Sound and Raritan bay. On either side of the middle or dividing line, the two states are respectively *owners*; New York on the easterly, and New Jersey on the westerly side thereof. (*Angell on Tide Waters*, p. 86, &c. ch. 4, p. 123, n.) The right to construct wharves, piers and other improvements, follows as an inherent result.

Within its boundary the property of the state is exclusive and unqualified—as well in lands under water in the sea, and navigable rivers, as in upland. (2 *Black. Com.* 262.)

It is a maxim of international jurisprudence, that within its territorial limits, the authority of a state is supreme and exclusive of every other state. And all property, real and personal, as well as persons, within those territorial limits, are wholly subordinate to the laws, authority and control of such state. A state has exclusive authority to determine and regulate the manner of holding and using such property; and the validity of all acts done within its boundaries. Another rule is alike primary and fundamental; each state has the exclusive right to determine and administer the remedies and modes of redress for any use or appropriation of real estate within such boundaries, which is not warranted by its own laws; and to sustain and uphold such use where its own laws give their sanction. These rules deny to the state of New York any right or interference in any form with the

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lands or waters west of the boundary line ; for no state can by its own laws affect or bind real estate out of its own territory.

An act which is lawful within the limits of the state where it is committed is to be regarded as lawful everywhere, whether it affect person or property, real or personal, within those limits. By force therefore of the first article of the treaty the state of New Jersey has the right to any and every use of the waters and lands under water which is involved in exclusive proprietorship. This includes the right to build docks, wharves, piers, &c. and the right to redeem lands from the water. This proprietorship is the warrant for each state to construct wharves, &c. on their respective sides of the river above Spuyten Duyvel creek. And yet the right rests on the first article, and these rules which result therefrom, and on them only.

The third article of the treaty is not only not in conflict with the first, nor with the view thus presented of its legal effect and operation, but it affirms and establishes the propositions deduced therefrom. (*See Article 3d.*) The jurisdiction of New York is made expressly subject to the rights of property, and to the jurisdiction of New York, viz : 1. The state of New Jersey shall have the exclusive right of property in, and to the land under the water lying west of the boundary line. 2. The state of New Jersey shall have the exclusive jurisdiction of and over the wharves, docks and other improvements made, and to be made on the shore of the said state, and of and over vessels, &c. &c. fastened to such wharf or dock. This is a clear and unequivocal declaration in express terms of the exclusive rights which as above insisted are implied in the establishment of the boundary by the first article. It was here inserted, to avoid any uncertainty respecting the operation of the grant of jurisdiction to New York, and to make that grant wholly subject and subordinate. Exclusive jurisdiction over wharves, docks

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and other improvements to be made, imports the right to make, and jurisdiction to regulate and control the mode and manner of making. The parties did not intend to make, and did not make the property of New Jersey, nor her exclusive jurisdiction of, and over wharves, docks and improvements to be made, subject to the jurisdiction of New York, but to make the jurisdiction of New York subject to them. The questions how the lands under water shall be enjoyed or used, when and in what manner wharves and other improvements shall be made, New Jersey may determine for herself, and to her determination the jurisdiction of New York is subject and subordinate. And her jurisdiction over wharves, &c. to be made imports such power, and assumes that they will be made, under the control and discretion which such jurisdiction implies.

The right of jurisdiction conceded to the state of New York to low water mark is not inconsistent with the right of New Jersey to build such docks, wharves and other improvements, or to redeem lands from the water. It can have full operation and effect for all the purposes of the agreement. The object was in this respect, to give to New York jurisdiction over waters, and not over land then made, or thereafter to be made, whether the changes were produced by natural causes or artificial means. The argument of the complaint would make low water mark a fixed line precisely where it was found at the date of the treaty. Can it be gravely argued, that it was intended to give New York jurisdiction over lands, or erections thereon, stores, dwellings, or other improvements, which (by whatever authority) should by any means be added to her shores? Low water mark is a fluctuating line, and jurisdiction limited by that line, advances or recedes with such fluctuation. Besides, the jurisdiction given to New York, "of and over the waters and lands under the waters" is fully satisfied by the evident intention to give such jurisdiction over the waters, and over the lands while under the water. This must necessarily be so, when

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New Jersey has exclusive property therein, and having such property, the treaty gives her jurisdiction over wharves, &c. *to be made*. Giving to her property in the lands under the water, gave her property *usque ad cælum*. There is therefore nothing incongruous, or inconsistent with the jurisdiction given to New York, in the right of New Jersey to build wharves, or reclaim lands from the water. Any other construction asserts that neither state has the right to construct a wharf for any useful purpose, nor reclaim any land below low water mark at any place on the west side of the Hudson river and bay of New York, or on the west side of Staten Island, below Woodbridge creek, and on that island along Raritan bay, however important to either it may be, and whatever the lapse of time, or exigences of trade or commerce may require. Such construction is not to be tolerated, and it may safely be asserted that neither New York or New Jersey, would have ever consented to such a relinquishment of power, so important to each; and it is not less clear that the congress of the United States would not have consented to such a restriction upon the claims and interests of trade and commerce.

The practical construction heretofore given to the treaty, in this respect, affirms this view of the rights of the state of New Jersey; a view which has never before been questioned, but fully acquiesced in by the state of New York.

If the terms of the treaty were doubtful, thirty-three years of practical exposition of the rights of the parties have demonstrated the meaning of the treaty in question. Witness the wharves, &c. at Weehawken, Hoboken and Harsimus, and an immense area of lands there once covered with water, with the long wharf extending a mile or more from the upland, and now the location of the depot and warehouses of the Erie railway company, and the track of their railroad, &c. wharves, ferry slips, docks and bulkheads of Jersey City, with streets and warehouses thereon. If coterminous usage and acquiescence in long continued exercise of rights claimed, can

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avail to settle the meaning and effect of a treaty or compact, the claim of the defendants is now conclusively settled in conformity with the views now submitted on their behalf.

III. New Jersey having, therefore, the *exclusive* right of property in the land under water, and having *exclusive* jurisdiction over docks, wharves and other improvements *to be made*, the jurisdiction of the state of New York, and of the courts of New York, is necessarily excluded. Laying out of view for a moment the alleged effect upon navigation or upon health, the length or breadth of the alleged improvements is wholly immaterial. That, New Jersey has the right to determine for herself. So as to the mode and manner of making the same, New Jersey is not subject, *directly* nor *indirectly*, to the control of New York or its courts.

IV. The exclusive right of property being in New Jersey and the jurisdiction of that state *of* as well as *over* wharves, docks and improvements *to be made* being exclusive, the case is narrowed to this inquiry. Can the courts of New York take cognizance of and will they entertain an action to *abate* an alleged nuisance on the shore of New Jersey—it being on the property of that state, within its boundaries and the subject of exclusive jurisdiction, on the ground that it interferes with the navigation of the bay or river, or gives out an offensive or unhealthful odor? This court has not such jurisdiction.

The *county of New York* extends no farther than the middle of the river and bay. It only extends “to the west bounds of the state.” (1 *R. S. 5th ed.* p. 130.) The “boundary” of the state is fixed by the treaty in the middle of the river and bay. (*Art. 1st, R. S. 5th ed.* p. 81. The first judicial district embraces only the city and county of New York. An action to abate a nuisance is in its nature local. (*See infra.*)

The sheriff of New York can execute no process without the *boundaries* of the state, except such as is in terms described in the seventh article of the treaty.

Practically, the contest here is between the two states, New York and New Jersey, to settle the construction and effect

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of this treaty. But New York cannot implead the state of New Jersey in our courts, nor compel her appearance, nor enforce against her such a decree as is sought. This is an attempt to accomplish the result indirectly. It is not fitting nor proper for the courts of either state to assume jurisdiction, to control the use or improvement of real estate within the boundaries of the other. If there be any wrong, the remedy should be pursued in that high tribunal which is clothed by the constitution of the United States with jurisdiction.

V. The subject over which jurisdiction is claimed is real estate, and its use and enjoyment. 1. It follows from the principles already stated, and is an incontrovertible rule of international law, that real estate within the *territorial limits* of a state is governed by the laws of that state. Where New Jersey exercises her right to construct wharves, reclaim lands, &c. the jurisdiction of New York is *pro tanto* displaced. (See *U. S. v. Crosby*, 7 *Cranch*, 115. *Clark v. Graham*, 5 *Wheat*. 597. *Kerr v. Mason*, 9 *id.* 566. *Holmes v. Remsen*, 4 *John. Ch.* 460. 20 *id.* 254. *Hosford v. Nichols*, 1 *Paige*, 220. *Chapman v. Robertson*, 6 *id.* 627, 630.) 2. The jurisdiction conferred on New York is not inconsistent with the right of New Jersey to make wharves, reclaim lands, &c. That jurisdiction was of waters and lands under water, as *waters* and lands *under water*. When, in fact, reclaimed, the jurisdiction does not embrace them. 3. The action is local. Real actions must be brought in the place, *rei sitæ*. In respect to immovable property, every decree of a tribunal without the territorial limits of the state is utterly nugatory, and incapable of enforcement *in rem*. (*Story's Conflict of Laws*, § 551.) So of mixed actions so far as they concern the reality. (*Story*, § 552.) An action on the case for an injury to real property situated in another state, cannot be maintained in the courts of this state. (*Watts v. Kinney*, 6 *Hill*, 82. 23 *Wend.* 434.) So actions, although brought merely for damages occasioned by injuries to *real* property, as trespass or case for *nuisances*,

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&c. are *local*. (1 *Chit. Pl.* 298, *ed. of 1833. Livingston v. Jefferson*, 1 *Brock.* 203.)

4th. The cases which permit a court of equity to hear and determine the rights of persons who may be within their jurisdiction by a decree *in personam*, to be executed *in personam*, do not apply to this case. An action to recover possession by decree *in personam* that defendant *surrender the possession* of lands out of the state, would be practically ejectment in a new form. The distinctions pertaining to this subject are clearly stated in *Gardner v. Ogden*, (22 *N. Y. Rep.* 327.) And in *Cumberland Coal Co. v. Hoffman Steam Co.* (30 *Barb.* 159,) it was held that the courts of this state *would not take* jurisdiction of an action between companies of another state to set aside, *for fraud*, a conveyance of lands in such other state.

This action is in substance a proceeding *in rem*. A decree *in rem* is sought. The abatement of the alleged nuisance is to be done by acting on the property itself. That cannot be compelled by any process against the defendants. This court can commission no officer to execute such a decree, not only without the county of New York, but within the declared boundary of New Jersey.

INGRAHAM, J. The *first* ground of objection to the complaint is the want of jurisdiction over the defendants.

The defendants are a foreign corporation. If it were necessary to proceed against them by attachment, to compel their appearance, the objection might have weight. Such is not this case. The defendants have appeared, and so far as respects bringing them into the court, and within its jurisdiction, that has been done by their voluntary act. Where a foreign corporation, by its officers, comes within this state, it becomes subject to the laws of the state, and to the process of the courts; and where such a corporation, by its officers, is guilty of a wrong, or commits a trespass, within the state, I know of no rule by which such a corporation can es-

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cape the consequences of its illegal acts, by setting up that it holds its existence under a foreign government.

For the purpose of this question, we must assume that the plaintiffs claim to have a right to the waters in the river where the defendants have taken possession. By the demurrer, they admit having taken such possession, and that they threaten to continue such possession, and to extend it. By the 134th section of the Code, service may be made on the officers of a foreign corporation in this state, or where the cause of action arose therein. What mode of service was adopted does not appear from the complaint; nor is it necessary to state, in the complaint, the mode by which it is expected to acquire such jurisdiction over the defendants.

We have these facts, then, viz. a claim of title to, and jurisdiction over the waters where the defendants have taken possession; they, by their officers, then being in possession, and without authority from the plaintiffs, show sufficient facts to give jurisdiction, if the process can be served on the defendants. If there is an improper service, that must be remedied by a motion.

*Second.* The remaining grounds are, that the court has no jurisdiction of the subject of the action, and that the facts do not constitute a cause of action.

The decision of these questions depends upon the views which are taken of the acts of the defendants, and, to some extent, renders an examination necessary as to the right of the plaintiffs to maintain any action for acts done in the river, west of the center line thereof.

This right, if it exists, is to be found in the agreement or treaty made between the states of New York and New Jersey, in 1833.(a)

(a) That agreement or treaty was as follows:

"ARTICLE I. The boundary line between the two states of New York and New Jersey, from a point in the middle of Hudson river, opposite the point on the west shore thereof, in the forty-first degree of north latitude, as heretofore ascertained and marked, to the main sea, shall be the middle of said river, of

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There is no doubt that, in navigable waters, where the tide ebbs and flows, the sovereign is the owner of the soil under the water, and of the waters which cover it. And where such waters form the boundary between two nations, such ownership is vested in each, to the portion of the stream adjoining the territory and extending to the center.

These rights may be varied by treaty, or by original grants or prior possession. I do not deem it necessary to enquire what rights the state of New York possessed to this portion of the river, prior to 1833. Whatever those rights were, they were all merged in the provisions of that agreement. By that instrument, the center of the river and bay was adopted as the boundary line between the states of New York and New Jersey, on that part of the river where these encroachments have been made.

By the third article of the agreement, the exclusive right of property in and to the land under water, lying west of the middle of the bay of New York and west of the middle of that part of the Hudson river, was declared to be the prop-

erty in and to the bay of New York, of the waters between Staten Island and New Jersey, and of Raritan bay to the main sea, except as hereinafter otherwise particularly mentioned.

ARTICLE II. The state of New York shall retain its present jurisdiction of and over Bedlows and Ellis' Islands, and shall also retain exclusive jurisdiction of and over the other islands lying in the waters above mentioned, and under the jurisdiction of that state.

ARTICLE III. The state of New York shall have and enjoy exclusive jurisdiction of and over all the waters of the bay of New York, and of and over all the waters of Hudson river lying west of Manhattan Island, and to the south of the mouth of Spuytenduyvel creek, and of and over the lands covered by the said waters, to the low water mark on the westerly or New Jersey side thereof, subject to the following rights of property, and of jurisdiction of the state of New Jersey, that is to say:

1. The state of New Jersey shall have the exclusive right of property, in and to the land under water lying west of the middle of the bay of New York, and west of the middle of that part of the Hudson river which lies between Manhattan Island and New Jersey.

2. The state of New Jersey shall have the exclusive jurisdiction of, and over the wharves, docks and improvements made, and to be made, on the shore of the said state, and of and over all vessels aground on said shore, or fastened

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erty of New Jersey, and by the same article the state of New Jersey was to have exclusive jurisdiction over the wharves, docks and improvements *made and to be made* on the shore of that state.

If we were to stop here, there would be no difficulty in disposing of this case. The title to the land under water, in the sovereign, includes all right to the waters, even the land, and vests in the sovereign the sole right of jurisdiction, and, of course, the right to control the encroachments upon such waters.

The other provisions, however, of this treaty alter materially the rights of the parties. The first part of the third article gives to the state of New York exclusive jurisdiction *over all the waters* of the bay, and all the waters of Hudson river, and of and *over the lands covered by said waters* to low water mark on the New Jersey shore, subject to the right of property in the land therein given to New Jersey. The whole case resolves itself into the inquiry, whether a jurisdiction in

to any such wharf or dock; except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers, of the state of New York, which now exist, or which may hereafter be passed.

3. The state of New Jersey shall have the exclusive right of regulating the fisheries, on the westerly side of the said waters, provided that the navigation be not obstructed or hindered.

ARTICLE IV. The state of New York shall have exclusive jurisdiction of and over the waters of the Kill Van Kull, between Staten Island and New Jersey, to the westernmost end of Shooter's Island, in respect to such quarantine laws and laws relating to passengers as now exist, or may hereafter be passed under the authority of that state, and for executing the same; and the said state shall also have exclusive jurisdiction, for the like purposes, of and over the waters of the sound, from the westernmost end of Shooter's Island to Woodbridge creek, as to all vessels bound to any port in the said state of New York.

ARTICLE V. The state of New Jersey shall have and enjoy exclusive jurisdiction of and over all the waters of the sound, between Staten Island and New Jersey, lying south of Woodbridge creek, and of and over all the waters of Raritan bay, lying westward of a line drawn from the light-house at Prince's bay to the mouth of the Mattavan creek, subject to the following rights of property and of jurisdiction of the state of New York:

1. The state of New York shall have the exclusive right of property in and

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the state of New York, exclusive over the waters of the river and over the land under the water, while the fee of the land has been vested in another party, (New Jersey,) gives a right of property therein sufficient to maintain an action for an encroachment upon it.

It must be remembered that these grants, on both sides, are between the sovereigns, and are not subject to the ordinary rules applicable to grants made to a subject or citizen. The sovereign power can grant all it possesses, or may grant a part and retain a part; and a grant of the land to one and a reservation of the water to the other, vests in the grantees all the rights which the sovereign originally had in the part granted, or reserve to the grantor all rights in the part reserved, which was not intended to be conveyed.

By the treaty, the right to the soil is transferred to New Jersey, while the exclusive jurisdiction of and over all the waters of the bay and river to the low water mark, on the New

to the land under water lying between the middle of said waters and Staten Island.

2. The state of New York shall have the exclusive jurisdiction of and over the wharves, docks and improvements, made and to be made, on the shore of Staten Island; and of and over all vessels aground on said shore, or fastened to any such wharf or dock, except that the said vessel shall be subject to the quarantine or health laws, and laws in relation to passengers of the state of New Jersey which now exist, or which may hereafter be passed.

3. The state of New York shall have the exclusive right of regulating the fisheries between the shore of Staten Island and the middle of the said waters, provided that the navigation of the said waters be not obstructed or hindered.

ARTICLE VI. Criminal process, issued under the authority of the state of New Jersey, against any person accused of an offense committed within that state; or committed on board of any vessel being under the exclusive jurisdiction of that state, as aforesaid; or committed against the regulations made or to be made by that state, in relation to the fisheries mentioned in the third article; and, also, civil process issued under the authority of the state of New Jersey, against any person domiciled in that state, or against property taken out of that state to evade the laws thereof, may be served upon any of the said waters within the exclusive jurisdiction of the state of New York, unless such person or property shall be on board a vessel aground upon or fastened to the shore upon the state of New York, or fastened to a wharf adjoining

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Jersey side thereof, and of and over the lands covered by the waters, is granted to New York.

The question then arises, what is meant by jurisdiction, and whether such grant of jurisdiction conveys any right which can be the subject of an action.

This jurisdiction cannot be the mere right to serve process, either civil or criminal, for that is provided for by articles six and seven, and it is made coequal to both the contracting parties, and is not exclusive.

It is the jurisdiction granted by one sovereign power to another, and, in that case, it means the right of exercising authority, of governing and controlling. This right is granted by the state of New Jersey to the state of New York, and the right by that grant is made exclusive, both as to the land and the water, up to low water mark on the New Jersey shore. And this jurisdiction and control is exclusive, even of New Jersey, except in three particulars; one, of title to the land under water; one, of the jurisdiction over wharves, docks and

thereto; or unless such person shall be under arrest, or such property shall be under seizure, by virtue of process or authority of the state of New York.

ARTICLE VII. Criminal process, issued under the authority of the state of New York, against any person accused of an offense committed within that state; or committed on board of any vessel being under the exclusive jurisdiction of that state, as aforesaid; or committed against the regulations made or to be made by that state, in relation to the fisheries mentioned in the fifth article; and, also, civil process issued under the authority of the state of New York, against any person domiciled in that state, or against property taken out of that state, to evade the laws thereof, may be served upon any of the said waters within the exclusive jurisdiction of the state of New Jersey, unless such person and property shall be on board a vessel aground upon and fastened to the shore of the state of New Jersey, or fastened to a wharf adjoining thereto; or unless such person shall be under arrest, or such property shall be under seizure, by virtue of process or authority of the state of New Jersey.

ARTICLE VIII. This agreement shall become binding on the two states when confirmed by the legislatures thereof respectively, and when approved by the congress of the United States."

The above agreement or treaty was ratified and confirmed by the legislature of New York, by an act passed February 5, 1834; (*Laws of New York*, 1834, ch. 8; 1 *Stat. at Large*, 1;) by the legislature of New Jersey, by an act passed February 26, 1834; and by an act of congress passed June 28, 1834.

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improvements, and one, of the fisheries. These three rights are reserved to New Jersey. What are these rights? The rights to the soil would prevent the state of New York from granting to another the land under water on the New Jersey shore. Such a grant, if made, must be made by the state that owns the fee. The right to a jurisdiction over the wharves, &c., naturally follows from the other, and is the reservation of the title and control of the land after it is made out of the water, on the shore of the state. The right to the regulation of the piling is immaterial to the questions before us. These are all the powers reserved to New Jersey. I cannot doubt but that this grant of exclusive jurisdiction to the state of New York, with the above exceptions, confers upon the state full power and authority to preserve the river and bay from injury by strangers having no authority so to act. The people of the state of New York have the sole right to exercise authority and control over the water, and the land covered by water, against all persons who have no right to take possession. That they may have such an interest in the water alone as would enable them to maintain an action against persons who, without right, thus seek to interfere with that control or jurisdiction, I have no doubt. It is not at all an uncommon thing for persons owning the bed of a river to convey to others a right to the water, and such a right may be protected and preserved by action, even against the grantee. In *People v. Canal Appraisers*, (33 N. Y. R. 461,) Chief Justice Davies discusses, at great length and with great ability, the rights of the state to navigable waters, and, although not deciding any of the questions raised in this case, yet he shows there that, both in the water and on the land under the water, the sovereign power possesses rights and estates which may be preserved and protected.

If this were an action against the state of New Jersey, very different questions would arise. It was in this view that the learned justice tried the case at the special term, and his decision is based more upon the right of New Jersey to build

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wharves and piers on her shores than upon the real merits of the case, as presented on this demurrer. I am free to admit that the article which gives to New Jersey the exclusive jurisdiction over wharves, docks and improvements made, and to be made, upon the shore of that state, would, if New Jersey was the defendant, raise a question of much importance and difficulty. That such a clause might be construed as giving to New Jersey the right to build piers and wharves below low water, is apparent, for the state of New York never claimed to own above low water mark, and her rights are only recognized to that extent in this treaty, and the term shore must have a more extended construction than between high and low water mark, because the same word is afterwards used, as places where vessels might get aground while navigating the river.

But that case is not before us on this demurrer.

By the demurrer, the defendants admit that the plaintiffs have the sole and exclusive jurisdiction over the bay and water of the Hudson river, and of the land covered with water, to low water mark on the New Jersey shore, as stated in the agreement, between the states of New York and New Jersey; that these waters are arms of the sea, in which individuals can have no right or title; that the defendants have taken possession of a tract of land under water in said bay and river and displaced the water by filling in the same to the extent of eight hundred acres in a portion of the said bay and river over which the plaintiffs have exclusive jurisdiction; that the defendants are engaged in filling in to a larger extent and will cause serious damage to the harbor of New York; and that the said defendants are so doing, without any right and without any grant or permission of the plaintiffs. By their admissions the defendants appear as simple wrongdoers and trespassers, committing a serious injury to the rights and property of the plaintiffs, which they seek to restrain. I see no good reason why, under such a state of facts, the defendants should not be restrained from doing fur-

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ther wrong and damage, until it appear that they have some better right and authority than their mere will and pleasure. To sustain this judgment would be an invitation to any body at their pleasure to sink blocks and piers in this portion of the river, regardless of the rights of New York.

Nor can it be said that it does not appear that this filling is not between high and low water mark and therefore not within the jurisdiction of the plaintiffs, because it is averred that this filled in ground has been connected with the main shore of New Jersey by a wooden tressale work about one mile in length. Even if it be conceded that after this land is made by the filling in, it becomes subject to the jurisdiction of New Jersey, still that does not relieve the defendants, because it is averred that they were engaged in the work and intend to extend their filling to a much larger extent; and as to that I have no doubt of the plaintiffs' right to interfere, until the defendants show some better authority than now appears in these papers.

I forbear to express any opinion upon the right claimed by New Jersey to build piers and wharves and make improvements on her shore. When the defendants by an answer claim that they have the authority of the state of New Jersey for their acts, that question will properly arise. It cannot be available on this demurrer.

Something was said about the extent of the county of New York, in connection with this action. The boundaries of the state extend to low water mark on the New Jersey shore. (1 *R. S.* 54.) That statute has not been altered. The county of New York, on its western boundary, extends to the west bounds of the state. (1 *R. S.* 5th ed. 3.) This description covers the disputed territory, so far as the boundaries are designated by any law of the state; so that the action is properly brought in this district.

The conclusion to which I have arrived is that the demurrer is not well taken; that the state of New York has such a right, title and interest in the waters of the bay and Hud-

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son river as will enable them to maintain this action ; and that the defendants are mere trespassers, and show no defense thereto.

The judgment should be reversed, and judgment ordered for the plaintiffs on the demurrer, with leave to the defendants to answer on payment of costs.

LEONARD, J. concurred.

SUTHERLAND, J. dissented.

Judgment reversed.

[NEW YORK GENERAL TERM, April 1, 1867. *Leonard, Ingraham and Sutherland*, Justices.]

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ABRAHAM DEBARRE and others *vs.* JOHNSTON LIVINGSTON,  
President of the Hope Express Company.

A receipt, such as is usually given by express companies for goods delivered to them to be carried by express, is not an *agreement* within the meaning of the stamp act, requiring a stamp of five cents.

It is a receipt for the property to be transported, and contains only a notice of the terms on which the company is willing to undertake the transportation. Such receipt is not subject to any stamp duty, but is excepted in the act of congress of 1865.

Whether congress has the power to declare a contract void for the want of the proper stamp? *Quære.*

THE plaintiffs sue the defendant to recover the value of two packages of goods delivered to him to be carried by express. The value of the property exceeded \$100. The property was not delivered. On the trial, after proof of delivery of the property to the defendant, and its value and loss, the defendant offered in evidence the receipt which was given on the delivery of the packages by the defendant. This receipt, in addition to acknowledging the delivery to him of the packages, contained certain terms and conditions on which the

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defendant agreed to carry the same, and limiting his liability to fifty dollars, and was signed by the agent of the defendant. The date was in July, 1865. This paper was objected to by the plaintiffs on the ground that it had no revenue stamp thereon, and was excluded by the court. The plaintiffs had a verdict for the full amount claimed, and the defendant appealed.

*C. A. Seward*, for the appellant. I. A common carrier may limit his liability in any manner not *contra bonos mores*. (*The New York Manufacturing Co. v. The Illinois C. R. R. Co.*, 3 *Wallace Sup. Ct. Reps.* 107.)

II. The issuance and acceptance of the given receipt effected such limitation in the present case. The shipper was bound by the \$50 stipulation, which was legal. (*Newstadt v. Adams*, 5 *Duer* 43. *Van Winkle v. Adams*, *MM. Supr. Court*, *Hoffman*, *Pierrepont and Moncrief*, *JJ.* *Dorr v. N. J. S. Nav. Co.*, 1 *Kern* 485. *Parsons v. Monteath*, 13 *Barb. R.* 353. *Moore v. Evans*, 14 *id.* 524.) In the case cited from the 3d of *Wallace*, the charge of the judge, which was sustained by the Supreme Court, was: "It is competent for the carrier alone to limit his liability without the engagement of the owner." This is universal law. Every bill of lading is unilateral so far as the signatures are concerned, and yet the shipper by accepting it is universally held to be concluded by its terms. The rule is the same also, both as to mortgages and as to policies of insurance. As to both of these, acceptance is assent to expressed conditions.

III. The ruling of the court below, excluding the receipt as evidence, was most disastrous in its results, and should not be sustained unless it is so clearly correct, that no reasonable legal doubt can be urged against it. 1. It makes the 440 express companies liable every day for millions of property, the value of which the owners do not choose to declare, lest they should be obliged to pay increased charges thereon. 2. It renders the companies liable to pay enormous fines for a fail-

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ure, since the date of the passage of the internal revenue laws, to affix the five cent stamp. 3. It renders the officers and agents of the companies liable to indictment and imprisonment for the same neglect; and 4. It violates the actual and practical construction placed upon the revenue laws both by the treasury department of the United States and by the companies.

IV. The United States internal revenue laws do not require a five cent stamp to be affixed to receipts issued by express companies. It is only necessary to an acquiescence in this proposition that the legislation by congress, in reference to these companies, should be understood. The first internal revenue act was passed July 1, 1862. (12 *U. S. Stat. at Large*, 432.) Section 105 of this act was as follows:

“*And be it further enacted*, That on and after the date on which this act shall take effect, no express company, or its agent, or employee, shall receive for transportation from any person any bale, bundle, box, article or package of any description, without either delivering to the consignor thereof a printed receipt, having stamped, or affixed, thereon a stamp denoting the duty imposed by this act, or without affixing thereto an adhesive stamp or stamps denoting such duty, and in default thereof shall incur a penalty of ten dollars: *Provided*, that but one stamped receipt or stamp shall be required for each shipment from one party to another party at the same time, whether such shipment consists of one or more packages: *And provided, also*, that no stamped receipts or stamp shall be required for any bale, bundle, box, article or package transported for the government, nor for such bales, bundles, boxes or packages as are transported by such companies without charge thereon.”

To section 110 was appended “schedule B,” which contained a clause as follows: “Express.—For every receipt or stamp issued, by any express company, or carrier, or person whose occupation it is to act as such, for all boxes, bales,

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packages, articles or bundles, for the transportation of which, such company, carrier or person, shall receive a compensation of not over twenty-five cents, one cent. When said compensation exceeds the sum of twenty-five cents, and not over one dollar, two cents. When one or more packages are sent to the same address at the same time, and the compensation therefor exceeds one dollar, five cents. The first paragraph of schedule B initiates the five cent stamp duty on agreements. Its language is, "Schedule B. Stamp duties. Agreement or contract other than those specified in this schedule," five cents per sheet. Inasmuch as express receipts were specified in schedule B, by name, this first clause as to "agreement or contract" had no application to them, and hence they did not require a five cent stamp. The practical working of this provision was so onerous and cumbersome that the companies applied to congress to change the method of taxation from a stamp tax upon the receipt or package to a tax upon their gross receipts. This request was complied with. On the 3d of March, 1863, congress passed another act, entitled "An act to amend" the act of July 1, 1862, the first section of which (12 *U. S. Stat. at Large*, 713) declares that the act of July 1, 1862, "be, and the same is hereby amended as hereinafter set forth, namely," and section 110 of the act of July 1, is declared by section 6 (*p.* 720) to be amended as follows: \* \* \* "The duty or stamp required for transportation by express companies and others, is hereby repealed, and such transportation shall be exempt from stamp duty." This did away with stamps of every kind. The stamp was replaced by a duty on gross cash receipts. Section 10 of the act of 1863 was as follows:

"*And be it further enacted*, That on and after the first day of April, eighteen hundred and sixty-three, any person or persons, firms, companies or corporations carrying on or doing an express business shall, in lieu of the tax and stamp duties imposed by existing laws, be subject to and pay a duty of two per centum on the gross amount of all the receipts of

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such express business, and shall be subject to the same provisions, rules and penalties as are prescribed in section eighty of the act to which this is an amendment, for the persons, firms, companies or corporations owning, or possessing, or having the management of railroads, steamboats and ferry-boats; and all acts or part[s] of acts inconsistent herewith, are hereby repealed."

Then came the act of June 30, 1864, which repealed the foregoing provisions and substituted in section 104, (13 *U. S. Stat. at Large*, 276,) the following: "*And be it further enacted*, That any person, firm, company or corporation carrying on or doing an express business, shall be subject to and pay a duty of three per centum on the gross amount of all the receipts of such express business." Section 151 of this act re-enacted schedule B. The important parts are these, (p. 298 :) "Agreement or contract, other than those specified in this schedule," five cents per sheet. "Receipts for the delivery of any property, two cents." So the companies found themselves doubly taxed; once on their gross receipts and once for the stamp duty so specifically laid in schedule B. as to exclude the idea that they were also to pay a further duty of five cents as an agreement stamp. The companies rebelled against this and, refusing to stamp, were sued and their agents were indicted. Application was made for relief to the commissioner, upon the ground that Mr. Fessenden, then secretary of the treasury, had advised the companies that the imposition of a stamp duty on their receipts was unintentional and that they need not comply with the law. The commissioner was also asked what amount of stamp was required to be placed upon the express receipts. His answer was as follows: \* \* \* "I think that the excise act requires that each particular receipt shall be stamped with a two cent stamp, and that I have no authority to accept a composition for the amount of duties which have accrued, or which shall hereafter accrue, except by way of compromise of suits that have been instituted. An unstamped receipt is not admissi-

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ble as evidence, and, therefore, cannot be used as a discharge of the company, nor can it be used for any purpose in a court of justice."

The express companies complied with this decision, and used a two cent stamp till the next session of congress, when they applied to be relieved therefrom. Such relief was granted by the act of congress of March 3d, 1865, entitled "an act to amend the act" of June 30, 1864, (13 *U. S. Stat. at Large*, 469.) That act amends schedule B, as follows: "That schedule B, preceding section one hundred and seventy-one, be amended in the paragraph marked "receipts," by inserting after the word "property," the words "except receipts issued by any persons, firms or companies doing business as an express or express company on the delivery of any property for transportation." Since this act went into effect, the express companies have not been required to stamp their receipts.

From this resume it results, 1st. That congress has recognized an express receipt as a well known commercial instrument, having a distinct and independent individuality and identity, under and by the name of "express receipts." 2d. That congress originally intended to tax such instruments, *eo nomine*, by a distinct and independent stamp duty, graduated by the rate of express charge. 3d. That the imposition of such specific stamp duty, together with the distinct specification of "express receipts," in schedule B, excludes the idea that by the words in the act of 1862, "agreement or contract other than those specified in this schedule," five cents per sheet, congress intended to impose a further duty of five cents upon each express receipt. So to construe the act of 1862, would be, (a.) To violate the clear intention of congress. (b.) To nullify the words "other than those specified in this schedule," which does distinctly specify "express receipts" *eo nomine*. (c.) To require an agreement stamp upon every note, bill, bond, &c. notwithstanding each of such instruments is specified in the schedule. 4th. That congress

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changed the method of taxation advisedly, and placed the tax upon the gross incomes of express companies, and relieved them from all stamp duties. The same language is preserved in schedule B, in the act of 1864, as amended by the act of 1865, viz: "Agreement or contract *other than those specified in this schedule.*" Express receipts are there specified, and with a renewed intent to exempt them from taxation, by the words, "*except receipts issued by express companies on the delivery of any property for transportation,*" being the same "receipts issued by express companies for transportation," upon which the act of 1862 placed a graduated stamp duty, and which were relieved therefrom by the act of 1863. 5th. That express companies do not require an agreement stamp.

V. Section 158, of 1864, as amended by the act of 1865, (13 *U. S. Stat. at Large*, 481,) provides, "that any person who shall issue any instrument without the same being duly stamped, *with intent to evade the provisions* of this act, shall forfeit," &c. "and such instruments shall be deemed invalid and of no effect." The "intent to evade" is here made the essence of the offense; and it must pre-exist before the prescribed penalties can attach. Inasmuch as the law, as interpreted by the treasury department, does not require express companies to use a five cent stamp, no such intent can be said to have pre-existed, and the court erred, therefore, without proof of such intent, in excluding the receipt. In the parallel case of *Desmond v. Norris*, (10 *Allen*, 250,) the court said: "It is only when such omission is fraudulent, that the guilty party is subject to a fine. It is sufficient for the decision of this case, that it does not appear that there was any willful violation of the law." In *Trull v. Moulton*, (13 *id.*) the same court said: "In order to affect the validity of the note, it should be averred that the stamp was fraudulently omitted." Of course, if it is necessary to aver it, it is equally necessary to prove it. (*People v. Utter*, 44 *Barb.* 170.)

VI. The act of congress of 1865, in so far as it attempts to

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invalidate contracts valid *lege loci* for a neglect to stamp them is, *ultra vires*, unconstitutional and void.

*H. Morrison*, for the respondents. I. The objection to the paper being admitted in evidence, was well taken, for the reason that the same was an agreement which should have had affixed to it a revenue stamp duly canceled. (*Schedule B*, § 170, *Act of congress, June 30, 1864*.) "A receipt connected with and qualified by the terms of an agreement contained in the same instrument cannot be read as a receipt without an agreement stamp." (*Per Lord Ellenborough, Odyce v. Cookney*, 1 *Mod. R.* 517.) "Cannot be read in evidence, cannot receive any legal operation; parol evidence cannot be heard to cure it." (3 *Stark. Ev.* 1056; *see title defect of stamp, and cases cited in notes S and T. Tabbutt v. Ambler*, 9 *C. & P.* 60.) "Where the same instrument contains an agreement for the sale of fixtures, and words of demise of a house, a lease stamp is requisite." (3 *Stark. Ev.* 1047. *Corder v. Drakeford*, 3 *Taunt.* 382. *Coster v. Cowley*, 7 *Bing.* 457. 11 *id.* 197. *Clayton v. Burdenshaw*, 5 *B. & C.* 41. 11 *id.* 138.)

II. The constitution of the United States preserves the right to impose duties, to collect revenue. (*Article 8, Constitution of U. S.*) And by the same article, (*sec. 17*), "to make all laws which shall be necessary and proper for carrying into execution the power;" *ergo* the exception of the appellants' case, is groundless.

III. That portion of the paper which follows the receipt is void as an agreement, being *nudum pactum*, for the reason that it claims to exonerate the appellants from any liability; even for their fraud or willful acts of destruction of the property entrusted to them as bailees. No law will recognize an agreement to that extent.

*By the Court*, INGRAHAM, J. The question in this case is whether a receipt such as is usually given by express compa-

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nies for goods delivered to them to be carried by express should be stamped.

By the act of 1862 express companies were prohibited from receiving any packages for transportation without delivering therefor a printed receipt having a stamp thereon, as required by that act, and such stamp duties varied from one to five cents according to the amount of freight to be received therefor.

The act of 1863 repealed all duties by way of stamps against express companies, and substituted in its place a duty of two per cent on the gross amount of all receipts of the express business, and all acts unconnected therewith were repealed.

The act of 1864 repealed this last provision, and enacted a duty of three per cent on the gross amount of the receipts of the company. The same act also provided a stamp duty on "receipts for the delivery of any property."

The act of 1865 amended the last act by adding after the words providing a stamp duty on "receipts for the delivery of any property," the following, "except receipts issued by any persons, firms or companies doing business as an express or express company, on the delivery of any property for transportation." These alterations of the law left the express companies subject to a tax of three per cent on their gross income, and free from any stamp duty on the receipt they should issue on the delivery of property for transportation.

There is no difficulty in understanding these provisions, and unless the paper called a receipt can be treated as a contract between the parties, and not as a receipt, there could be no ground on which a stamp could be considered necessary. The plaintiffs' counsel contended that the receipt was subject to a stamp duty of five cents under the provision requiring a stamp to an agreement or contract; and the court so ruled. The exception of this receipt from a stamp duty, in the act of 1865, excepts receipts issued by the companies on delivery of the property. There is nothing in this

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paper amounting to an agreement such as was contemplated by this statute. The company give a receipt for the goods, stating the directions and quantity, and they annex to the receipt a notice that as a part of the consideration of the contract they are forwarders only, and that they are not responsible. There is nothing in the paper which binds them to do any thing beyond delivery. All that it contains, is a refusal to be bound beyond a certain amount and under certain conditions. It is in fact a statement of the conditions on which they receive the goods for transportation.

I cannot adopt the conclusion that this is subject to a stamp duty of five cents. That is only applicable to an agreement other than those specified in that schedule B, and of course excepts receipts for property to be delivered. Such a receipt would amount to nothing if it did not contain a description of the agreement for delivery, such as the person to whom it was to be delivered, the place of delivery, the conditions on which it was to be carried. All this might properly be inserted in the receipt and subject it only to a stamp duty of two cents. The exception in regard to these receipts relieved them from that duty of two cents. I think also the intent of congress may be inferred from the previous legislation on this subject. Originally, the companies were compelled to give a receipt with a stamp of one to three cents, and the provision as to agreements excepted all others contained in the same schedule. And then the act of 1863 relieved these companies from all obligation to pay these duties, and expressly declared them exempt from stamp duty.

The act of 1864 which was a new act in place of the former internal revenue act, again enacted a duty of two cents on receipts for property to be delivered, which were again excepted from liability to a stamp of five cents on an agreement. But this was in 1865 again relieved by an exception in favor of these companies. This whole course of legislation shows that the receipts ordinarily given by these

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companies was not intended to be charged, at any time, beyond two cents duty, and while the duty on the gross receipts was exacted that no duty was to be charged on the receipt.

The term receipts, issued by express companies, must be understood as meaning such papers as had usually been issued by them on delivery of property to them for transportation. They were originally required to give printed receipts. Such receipts were only subject to a specified tax. It is the same kind of receipt that the various acts refer to in the subsequent provisions I have noted.

My conclusions are :

1. That this receipt is not an agreement within the meaning of the stamp act, requiring a stamp of five cents.

2. That it is a receipt for the property to be transported, and contains only a notice of the terms on which the company is willing to undertake the transportation.

3. That such receipt is not subject to any stamp duty, but is excepted in the act of 1865.

4. That the court below erred in excluding the paper offered.

The conclusion to which I have arrived, renders it unnecessary for me to examine the other question argued by the counsel, that congress has not the power to declare a contract void for want of a proper stamp. The clause which vests in congress the power to make all laws necessary and proper to carry into execution the express powers granted, has of late received, on several occasions, such an extended construction, as to cover almost every power which in the opinion of congress is deemed desirable, and may be in this way held sufficient for the present purpose. It is not necessary, however, to express any opinion on this point.

The judgment should be reversed, and a new trial ordered ; costs to abide the event.

[NEW YORK GENERAL TERM, April 1, 1867. *Leonard, Ingraham and James C. Smith*, Justices.]

GOODYEAR, exec'r, &c. *vs.* THE PHOENIX RUBBER COMPANY.

Where a corporation is the defendant, the plaintiff cannot have an order for the examination of the defendant as a witness, by its president and secretary. The 390th and 391st sections of the Code refer to examination of *parties* not of the agents, officers or servants of parties to a suit. It was not the intention of the legislature to authorize the examination of a corporation as a witness. In an action for an accounting, it is premature to take the examination of witnesses until it is decided that the plaintiff is entitled to an accounting.

**A**PPEAL from an order made at a special term, denying an application, by the plaintiff, for the examination of the president and secretary of the defendant as witnesses in this action, which was brought for an accounting.

*By the Court*, INGRAHAM, J. The plaintiff obtained an order, at chambers, to examine the defendants, by their president and secretary. On the return of the order, objection was made to the examination of the president and secretary, on the ground that they were not the defendants, and the judge denied the application. The plaintiff appealed to this court.

I can see no ground for such an examination. The 390th and 391st sections of the Code evidently refer to an examination of *parties*, not of the agents, officers or servants of parties to a suit. I should hardly suppose that it ever entered into the minds of the legislature to bring up a corporation for examination as a witness. A corporation, as such, cannot testify, and can only declare its acts by the resolutions passed by the board of directors. The president or secretary is not the corporation; he cannot bind the corporation, except by its authority; nor can either testify to facts, as known to the corporation, because they were known to him, personally.

Either of these parties can be used as a witness on the trial, but only as a witness, and can be examined as such under other provisions of the Code, where a proper case therefor is made out.

The case relied upon by the plaintiff—*Place v. Butter-*

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Goodyear v. Phoenix Rubber Company.

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nuts' *Woolen and Cotton Manufacturing Co.* (28 Barb. 503,) is not applicable. The question there was whether the justice, who was related to a stockholder, could try the cause, and it was held that he could not; that, within the intent of the statute, the stockholder was to be deemed a party. The real question there was whether the stockholder was so far interested as to disqualify him as a witness, and if so, to disqualify a relative. No one, under such a decision, would claim the right to examine all the stockholders of a corporation, as parties, and make the corporation responsible for the admissions that such stockholders might make. When such is held to be the law, the system of acting by corporations had better be abolished. The *Revised Statutes* (vol. 2, p. 407, § 80,) prohibit using the admissions of members of corporations, unless made in transacting business which they are the authorized agents of the corporation to perform. If they are parties, their admissions would bind them; if the mere agents of the corporation, they have no power to make admissions.

If the party needs a discovery he can obtain it, on proper papers, for a discovery of entries in the books and papers of the defendants. If there are none such, I do not see that he can take the personal knowledge of the officers and charge that to be the knowledge of the company. If he cannot do this he has no right to claim that the officers are the defendants; but if he wants their evidence he must get it in the same way as the evidence of any other witness is obtained.

There might have been another objection to this examination now; that is, that it is premature. The action is for an accounting. Until it is decided that the plaintiff is entitled to an accounting, there is no propriety in taking evidence connected therewith.

The order at special term was proper, and should be affirmed.

[NEW YORK GENERAL TERM, April 1, 1867. *Leonard, Clarke and Ingraham, Justices.*]

**THE PEOPLE OF THE STATE OF NEW YORK and JOHN T. HOFFMAN, Mayor, &c. of New York, vs. THOMAS C. ACTON and others, Commissioners of the Metropolitan Police, and the Board of Metropolitan Police.**

The 12th section of the act of the legislature of 1867, (*Laws of 1867, ch. 806*), which commits to the Board of Metropolitan Police all the powers and duties conferred by law upon the mayor, the common council, the mayor and council, and all other boards and officers of the city of New York, (except the Metropolitan Board of Health,) in respect to the various subjects specified in the section, and also authorizes such board of police to alter, amend, modify or repeal all ordinances in force at the time of the passage of the act, concerning the persons, occupations or matters in said section mentioned, contravenes the provision of section 2, article 10, of the constitution of this state, which declares that "all city, town and village officers whose election or appointment is not provided for by the constitution, shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose," and is therefore void.

The legislature cannot confer the power to discharge duties, and make regulations to pass laws relating thereto, upon state officers, no matter how appointed, whether by the governor and senate, or by the legislature. And although the legislature might have the power to take the discharge of such duties from the mayor or common council of New York, they were required to place the performance of them with local officers or boards, and could not vest officers appointed under authority of the state with the performance of such duties.

**THIS** was a case agreed upon without action, submitted for the purpose of obtaining a decision as to the validity of a certain section incorporated into the tax law at the last session of the legislature, which the plaintiffs claim to be unconstitutional and void, and ask that the defendants be restrained from executing any of the powers, duties and privileges conferred thereby. The act is entitled "An act to enable the board of supervisors of the county of New York to raise money by tax for certain county purposes, to extend the powers of the Metropolitan Police, and to provide for the auditing and payment of unsettled claims against said county."

The 12th section of the act, which is the one of which the

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plaintiffs complained, provides as follows: "The Board of Metropolitan Police is hereby invested with and shall exercise all the powers and perform all the duties now conferred by laws and ordinances upon the mayor, the common council, the mayor and common council, and all other boards and officers (except the Metropolitan Board of Health) of the city of New York, in respect to theatres and places of public amusement, keepers of boarding houses for emigrant passengers, junk shop keepers and junk boatmen, pawnbrokers, venders, hawkers and pedlers, dealers in second hand articles, keepers of intelligence offices, auctioneers, hackney coaches and carriages and the owners and drivers thereof, carts and cartmen, cabs and cabmen, porters, hand-cartmen, omnibuses and omnibus drivers, cars and car drivers, to the same extent as though the said Board of Metropolitan Police was named in such laws and ordinances in the place and stead of the mayor, common council, or mayor and common council and other boards and officers of said city of New York. Such investiture of powers and duties shall exclude that of said mayor, common council and mayor and common council and other boards and officers."

The section also continued those ordinances passed in relation to the matters there referred to, in full force and effect, and the Board of Metropolitan Police was authorized to alter, amend, modify or repeal the same.

*David Dudley Field*, for the plaintiffs.

*L. B. Woodruff*, for the defendants.

INGRAHAM, J. The powers and duties which by this act are taken from the municipal authorities and are entrusted to the defendants, have been exercised by these authorities alone since there was any authority for the execution of them by any public body. The power to license in many of those cases was given to the mayor by the 24th section of the Mont-

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gomery charter, and as to the others similar powers have been confirmed or conferred by statute down to the passage of this act. It is not material for the purposes of this case to inquire particularly when or by what means these powers have been conferred. I state generally the fact that they were so entrusted to the municipal authorities, merely for the purpose of showing that from the commencement of the city government, these powers have always been treated as local matters, peculiarly belonging to the municipal authorities, to be controlled and exercised by them alone. But although these powers have always thus been conferred on municipal authorities, still they are not to be considered as franchises vesting in the common council any irrevocable title to their enjoyment and use. That question has been long since settled, and it must now be considered as settled law, that these are mere political powers, subject to the control of the legislature, to be regulated by that body, and that they confer no vested rights. These principles have been so frequently declared by the court, that I do not deem it necessary to cite authorities therefor. In fact, I do not understand the counsel for the plaintiffs as claiming any such right on behalf of the mayor or common council. But it is claimed by the counsel for the plaintiffs that these officers and duties are local, applicable to the city authorities, and should be performed by local boards or officers. So far as the power of legislation is in question I cannot agree to the proposition that the necessary legislation in regard to all such officers and duties is not appropriately within the power of the legislature. These laws have always originated with the legislature. They had the right and have always exercised the right of prescribing and controlling the powers and duties of all officers in the state, whether local or general, unless in cases where the constitution of the state restrained that power; but when the legislature goes beyond that power and directs the appointment of local officers to be made by state authority, either directly by an act of the legislature, or indirectly by officers

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appointed by the legislature or by the executive authority, the 10th article, 2d section, of the state constitution conflicts with the exercise of such a power.

The difficulty which occurs to me, however, on this branch of the case is, that no class of persons referred to in the 12th section of this act can be said to belong to public officers. A license to a person to follow any particular trade or business is not an appointment to office, nor does it confer any of the powers or privileges of a public officer. It is a mere license to follow his calling, whatever it may be. The duties to be performed are not public duties, and the public have no interest in their performance or omission. The object of the license is for the purpose of controlling the business and preventing its being conducted in a manner injurious to the public welfare. Beyond that, the public interest is not affected, and if the licensee neglects to act under his license, the public cannot complain.

The only ground of objection that can be taken to these provisions, under this article of the constitution, is, that officers to perform specific local and city duties are appointed by the state authorities, instead of being appointed by the city authorities or elected by the people.

Such has been the conclusion to which I have arrived, in regard to other laws of a similar character passed by the legislature within a few years past. Beginning with the case of *The People v. Draper*, (15 N. Y. R. 539,) down to the last case of *The People v. Pinckney*, (32 N. Y. R. 377,) it seems to have been conceded that city officers in existence at the time of the adoption of the constitution, or persons to discharge their duties, could not be appointed by the state or legislature, but must be elected by the people or appointed by the county or municipal authorities. In the first case, (*People v. Draper*,) Denio, C. J. says: "If the provisions of the statute had been limited, territorially, to the city of New York, it would have been in conflict with the section of the constitution referred to. If the public duties, with which

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the act charges the commissioners, cannot be performed by them, consistently with the constitution, their own appointment cannot be upheld."

In the latter case of *People v. Pinckney*, Brown, J. in a dissenting opinion relating to another point, remarks: "It is the power which this act gives to entrust the execution of the duty for providing for the prevention of fires to officers not elected by the people or appointed by local authorities, which, I think, conflicts with the constitution;" and Davis, J. in the prevailing opinion, says: "Conceding that a metropolitan fire district is created by the act, composed of the cities of New York and Brooklyn, it cannot be doubted but that the officers created under it are limited in their authority and functions to the city of New York alone. In my judgment, their appointment by the governor and senate is not and cannot be justified, on the grounds that enabled this court to uphold the organization and appointments of the metropolitan police bill." In *Clarke v. City of Rochester*, (28 N. Y. R. 605, 633,) Denio, C. J. says, in referring to several cases cited by him: "The principles settled in these cases are, that the legislature cannot commit the power of enacting laws to any other body than itself, not even to all the electors of the state." And again, "While general statutes must be enacted by the legislature, it is plain the power to make local regulations having the force of law, in limited localities, may be committed to other bodies representing the people in their local divisions, or to the people of those districts themselves. Our whole system of local governments in cities, villages and towns, depend on that distinction. It is recognized in the constitution itself, which prescribes to the legislature the duty to provide for the organization of cities, incorporated villages, &c., and it contains an irresistible implication that the authority to lay local taxes, &c., may be constitutionally committed to local boards or councils within the cities and villages."

If the principles settled in these decisions are correct, then

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the conclusion must follow that the legislature cannot confer the power to discharge duties and make regulations and pass laws relating thereto upon state officers, no matter how appointed, whether by the governor and senate or by the legislature ; and, although the legislature might have the power to take the discharge of such duties from the mayor or common council, they were required to place the performance of them with local officers or boards, and could not vest officers appointed under authority of the state with the performance of such duties.

Another objection to the validity of this law is made by the plaintiffs' counsel, that it is a local law and embraces more than one subject.

In the case of *The People, ex. rel. Bradley, v. Stephens*, (2 Abb. N. S. 348,) this question was raised, with others, and a doubt was expressed by me whether a tax bill was a local act, within the meaning of the constitution. The decision of that question, at that time, was, however, unnecessary in disposing of that case, as the proceeding was for a mandamus, which was not a proper remedy where the title to an office was in dispute, and on the latter ground the application was denied.

The tax law, which contains these clauses; provides for extending the power of the metropolitan police, and this object is stated in the title. So far as there is any legislation, in regard to this board, it is not local, and the union with these provisions of others, relating to local matters, would not, necessarily, render such legislation void. I do not think it by any means clear that such an act can properly be declared a local act. Even if it should be held to be local, so far as it relates to the tax law, the other portions would not be, and it might be a serious question which should be rejected, the portion claimed to be local or that which is conceded to belong to general legislation.

Since the decision referred to above was made, the case of  
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*The People v. Hills*, (35 N. Y. Rep. 449,) has been decided, in which Davies, C. J. described the meaning of the term local, as applied to an act of the legislature in the constitution. He says, "Burrill defines the word local, relating to place, belonging or confined to a particular place, distinguished from general, personal or transitory." The act (then under consideration) is purely local in its application. It has no force beyond a particular city or county, and is, therefore, confined to a particular locality. It is not general, and has no application, except to the common council of a particular city. I assume that the act under consideration was local, within the meaning and intent of the constitutional inhibition."

Applying this description or definition of a local act to the portion of the one under consideration, containing the tax law, it would warrant the conclusion that it was local; and if so, it might be improper to place in it any other subject than the one which it was the main object of the law to enact. It is not, however, necessary to place the decision of this case on this ground. There are two other propositions which are made, as to the validity of this section, viz. one that the legislature could not delegate to the board of metropolitan police the power of legislation; and 2d, that the license fees being pledged to the sinking fund, the authority to repeal the laws granted to them is void and cannot be enforced. These two objections may both be considered under the question whether the legislature can thus delegate to the police board the power to legislate, as to licenses, and to amend and repeal corporation ordinances.

The constitution provides that the legislature may confer upon the board of supervisors powers of local legislation. The granting of such a power to the legislature naturally involves the supposition that they could not otherwise give such a power. If they could not give any such power to boards of supervisors, without a constitutional provision, I am at a loss to see any authority to bestow such a power on a board created by themselves, and not a recognized body in the constitu-

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tion. The powers given to them are to legislate in regard to local matters.

In *Barto v. Himrod et al.* (4 *Seld.* 483,) it was held that laws could only be enacted by the legislative bodies to which the legislative power is committed by the constitution. I see no good reason why the legislature should be allowed to commit to the board of police the power to legislate, when they could not even submit to the people the question whether they would approve of a law. (See also *Clarke v. City of Rochester*, (*supra*.)

It is said that municipal corporations possess such powers, delegated to them by the legislature. The power of legislating is a necessary right to a municipal corporation, and authority to confer on them legislative power, for local purposes, may be found in the ninth section of the eighth article of the constitution, which makes it the duty of the legislature to provide for the organization of cities and incorporated villages, &c. (See *Bank of Rome v. Village of Rome*, 18 *N. Y. Rep.* p. 38—41.) As such, they were in existence when the constitution was adopted, and were recognized, and their charters continued. Such a recognition would confirm to New York all the chartered powers and authority possessed at that time.

As to the right to repeal these laws, so far as they provided revenues which had been pledged to the sinking fund, there can be no doubt as to the want of authority even in the legislature.

The first act appropriating the revenues of the city to the payment of the public debt, was the act of 1812, chapter 99. That act pledged all the revenues of the corporation to the payment of the interest and principal of the debt then created, and they would continue so pledged until the final redemption of the stock. By the act of 1820, chapter 101, that pledge was applied to stock then to be raised, and so by the various acts passed it was continued. The act of 1838, chapter 127, authorizing the Croton water stock to be issued,

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applied all previous laws as to the pledge of the faith and revenues of the city to the payment of that stock. That debt is still in existence and unpaid. Neither the corporation nor the legislature can withdraw from that pledge any of the revenues heretofore appropriated thereto, without a violation of the public faith, and it ought not to be allowed. It is proper to add, that by this section these moneys, when received, are reserved to the sinking fund. These objections only apply, in part, to the provisions of the twelfth section under consideration, viz. that portion which authorizes the board of police to legislate on this subject, but, in connection with the other objections stated, they show the impropriety of vesting in bodies not recognized by the constitution the power to legislate on such matters.

I cannot better conclude my remarks on these questions than by quoting the expressive language of an extract made by Chief Justice Davies, in *The People v. Hills*, above referred to. "To maintain the constitution is our first duty, and if the legislature has, for any cause, encroached upon that sacred instrument, or if an erroneous construction has been given to it, we are imperatively called upon to declare its meaning and to assert its supremacy. Nothing can be more dangerous to our free institutions, or to the rights of the people, than to encourage doubtful interpretations of the constitution, contrary to its more plain and natural import, as understood by the great body of its readers."

I will only add to this, that attempts to defeat clear constitutional provisions by resorting to technical evasions, should be equally resisted and frustrated by the courts.

Upon the ground first stated, the plaintiffs are entitled to the relief asked for.

JAMES C. SMITH, J. The plaintiffs claim that the twelfth section of the act of 1867, (chapter 806,) referred to in the case submitted to us, contravenes the provision of section two, article ten, of the constitution of this state, which de-

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clares that "all city, town and village officers, whose election or appointment is not provided for by the constitution, shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose."

The section of the act referred to commits to the board of metropolitan police all the powers and duties conferred by law upon the mayor, the common council, the mayor and council, and all other boards and officers of the city of New York, (except the metropolitan board of health,) in respect to the various subjects specified in the section, and also authorizes such board of police to alter, amend, modify or repeal all ordinances in force at the time of the passage of the act, concerning the powers, occupations or matters in said section mentioned. It is unnecessary at present to refer particularly to the subjects which the section enumerates; it is sufficient to say, that they all relate to the government of the city, and are matters of police.

The Board of Metropolitan Police is composed of the commissioners of Metropolitan Police who are officers of the metropolitan police district, and are appointed by the governor with the consent of the senate. The district consists of the counties of New York, Kings, Westchester and Richmond, and certain towns in the county of Queens. (*Laws of 1857, ch. 569; of 1860, ch. 259.*)

It is argued on the part of the plaintiffs that as the provisions of the section under consideration are limited territorially to the city of New York, and the duties which they devolve upon the Board of Metropolitan Police are city duties, exclusively, the section violates the spirit of the constitutional provision referred to.

The constitutional provision invoked by the plaintiffs has been the subject of discussion and adjudication in the Court of Appeals. The case of *The People v. Draper*, (15 N. Y. Rep. 532,) presented the question of the constitutionality of the act of 1857, which created the metropolitan police district,

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with its board of police, and vested in the latter certain powers and duties in respect to the police regulation of the whole district which had been theretofore committed to officers elected by the several local constituencies within the district. It was objected in that case, that the act of 1857 was obnoxious to the constitutional provision now under consideration, but the objection was overruled. The judgment of the court proceeded upon the ground that the officers provided for by the bill were not county or city officers, but they were officers of the district thus organized, and the functions committed to them were to be exercised throughout the district. That was the turning point of the case. Chief Judge Denio, delivering the opinion of the court, said, "The superintendent of police, captains, sergeants and patrolmen mentioned in the bill are officials of the same character as those heretofore existing under somewhat different names; and if appointed for the city of New York, unconnected with the other territory annexed to it by the act, they should have been elected by the electors of the city, or of some division of it, or appointed by some authority of the city. The police commissioners, assuming that they were themselves constitutionally appointed, cannot be regarded as authorities of the city, within the meaning of the constitution. Hence it follows that if the provisions of the statute had been limited territorially to the city of New York, it would have been in conflict with the section of the constitution so often referred to," (p. 540.) It is apparent from the opinion that if the act of 1857 had limited the functions of the officers thereby created to his regulation of the police of the city of New York, it would have been declared unconstitutional.

The views of the Court of Appeals upon this point were again distinctly presented in the case of *The People v. Pinckney*, (32 N. Y. Rep. 377.) That case involved the constitutionality of the act of 1865, creating the metropolitan fire district. The bill united the cities of New York and Brooklyn into a district "to be known as the Metropolitan Fire

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District of the state of New York," and provided for the appointment by the governor, with the consent of the senate, of four citizens, residents of the district, as "Metropolitan Fire Commissioners," whose office was declared to be thereby created, but their functions and duties, as prescribed in the act, were in all respects territorially local, and confined to the city of New York. In the prevailing opinion, delivered by Davis, J. the decision in the case of *Draper* was referred to with approbation, and it was distinctly asserted, in respect to the question now in hand, that the officer to be appointed, "must be an officer of the new district or division, and not merely local in the scope and performance of his duties and functions, and therein suspending some existing local officer. He must be a distinct officer in the sense of his functions and authority, and not ~~merely~~ in name, with no power or duties beyond a previously organized locality." "It would not be competent, therefore," the learned judge proceeds to say, "for the legislature to create a new civil division of the state, and abrogate the local offices of the several counties that might compose it, and direct the appointment by the governor and senate of other officers limited to perform the same local functions only, although distinguished by new and more extended titles. If that were so, the central power could draw to itself the appointment of all local officers not expressly provided for by the constitution." The conclusion of the court upon the point thus presented was that the officers created by the metropolitan fire district act were not distinct officers in any just sense of the term, and that their appointment by the governor and senate could not be justified on the grounds that enabled the court to uphold the organization and appointments of the metropolitan police bill. It was justified, however, upon a different ground, to wit, that the functions committed to the officers created by the bill, were not previously discharged by persons who were public officers when the constitution was adopted, within the meaning of

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that instrument. The bearing of that position upon the case at bar, will be considered presently.

The principle so clearly and firmly established by the case of *Draper* and that of *Pinckney*, is fully applicable to the case in hand. The functions and duties transferred by the twelfth section are local, and confined to the city of New York. It is true, the officers to whom they are committed, are not merely local officers, and their offices were not created by the bill itself. But their offices were created since the adoption of the constitution, and they were appointed by the state authorities, and as the functions conferred on them by the section under review are purely local, the case is the same, with reference to the present question, as if the metropolitan board of police had been brought into existence by the act of 1867, with no other powers than those committed to them by the twelfth section. Thus viewed, the case obviously falls within the principle referred to, and must be controlled by it, unless excepted from its operation, by the considerations which prevailed in the case of *Pinckney*.

To those, more particular attention will now be directed. The functions which were committed to the new officers created by the act reviewed in that case, were of two classes: (1.) Those which were heretofore vested in the fire department of the city of New York, and (2.) Those which were given to "The mayor, aldermen and commonalty of the city in common council convened," and were part of their general corporate powers as an administrative and legislative body.

In respect to the first class, it was held that neither the corporation called "the fire department of the city of New York," as it existed previously to and at the time of the act in question, nor the officers elected under the provisions of its charter, nor the firemen who were members of the department, were public or civil officers within the meaning of the constitution. That "the corporation was not a municipal or political body, and neither it nor its officers occupied any

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greater official relation to the public than the officers or managers of the numerous religious and charitable corporations of the state."

The second class of functions consisted of an authority in the corporation of the city, to appoint the firemen and their officers, and power to legislate generally for their regulation. These were held to be no part of the official duties of individual officers composing the common council, but to be vested in the corporation, and it was also held that the corporation of the city is not an officer within the meaning of the tenth article. It was said that "to diminish or restrain its general legislative or administrative power as a body corporate, is not to abrogate or change a public office in the sense of the constitutional restriction."

I cannot adopt the conclusion, that the legislation contained in the twelfth section can be justified upon either of the grounds above stated. Unquestionably, the functions attempted to be transferred, are those of public officers. They are not only the powers of the mayor and common council acting together as the legislative body of the city, but all the powers and duties, respecting the subjects specified, of the mayor as the sole chief executive and administrative officer of the city, of the common council acting independently of the mayor, and of all other boards and officers of the city, with a single exception. The subjects to which these functions relate are various and extensive. Some pertain to classes of persons engaged in particular occupations and callings; others affect the convenience and comfort of the citizens at large. The section transfers the control of every public conveyance, by land, for the transportation of persons or property, and of every place of public amusement. And not only does it transfer all functions of an administrative or executive nature, pertaining to the subjects enumerated, but also the power of altering or repealing all existing ordinances in relation to them. By the act establishing the metropolitan police dis-

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trict, it is made the duty of the police board to obey and enforce all ordinances of common councils and boards of supervisors, and town and village authorities, within the district, which are applicable to police or health, (§ 5.) That provision is still in force, except that of section twelve of the act of 1867 is valid, in the single locality if the city of New York, the legislative power of the common council is subordinated to that of the board of police.

If these important powers can be taken from the city officers who have heretofore exercised them, and be centered in a new class of officers, not elected by the citizens, nor appointed by the city authorities, and who, as to the functions thus conferred, are purely local officers, acting only within the city, the constitutional limitation referred to is no protection to the rights intended to be preserved by it, for in like manner, every function of every local officer whatever, may be transferred to new local officers created by the legislature.

It is unnecessary to examine the other questions discussed on the argument. Upon the grounds above stated, I am of opinion that the plaintiffs are entitled to judgment declaring the provisions of said twelfth section unconstitutional and void, and restraining the defendants from exercising any of the powers conferred by it.

SUTHERLAND, J. concurred.

Judgment for the plaintiffs.

[NEW YORK GENERAL TERM, April 1, 1867. *Ingraham, Sutherland and James C. Smith, Justices.*]

## ELLIS and others vs. LEBSNER.

An action for claim and delivery of personal property may be brought against the wrongdoer, although he has parted with the possession of the property before the commencement of the action.

Where the defendant was charged with fraudulently obtaining the plaintiffs' property, and with having placed it on board of a vessel, and consigned to his uncle, in London, and it was alleged that the defendant had drawn drafts upon the bill of lading, payable when the property should arrive; *Held* that the case came within the above rule; and that the plaintiffs had a right to ask a jury to pass upon these questions, and, if they found the transaction to be fraudulent, to recover the value of the goods, if possession could not be delivered.

**T**HIS action was brought to recover personal property of which the plaintiffs claimed to be owners, and the possession of which belonged to them, and of which they were illegally deprived, and which the defendant has fraudulently converted to his own use.

The answer denied every allegation in the complaint, and also set up as a separate defense that the property had been shipped to Liverpool, and bills of lading obtained, and bills of exchange drawn against the bills of lading.

Upon the trial the cause was opened by the plaintiffs' counsel admitting the drawing of the bills, and the receipt of money upon them. The justice at the circuit dismissed the complaint, upon the ground that the property had passed from the possession of the defendant before the commencement of the suit. From this decision the plaintiffs appealed.

*S. Lay*, for the appellants. I. This appeal is to be treated as though all the facts stated in the opening had been regularly and competently proved, and no point can now be raised, except the one made at the trial, unless this court can see that under no state of circumstances could the objection now first made be obviated. The motion and the ruling treated all the facts stated as sufficiently proved.

II. The facts stated, made the sale conditional, and, uncontradicted, would have entitled the plaintiffs to a verdict,

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on the ground that no title passed to the defendant ; and, if contradicted, should have been submitted to a jury. (*Smith v. Lynes*, 5 *N. Y. Rep.* 41. *Herring v. Hoppock*, 15 *id.* 409. *Fleeman v. McKean*, 25 *Barb.* 474. *Acker v. Campbell*, 23 *Wend.* 372.)

III. The facts and circumstances stated in the opening were sufficient to warrant the conclusion that the property was purchased, with the fraudulent design, on the part of the defendant, not to pay for it ; which would avoid the sale. (*Hall v. Naylor*, 18 *N. Y. Rep.* 588. *Root v. French*, 13 *Wend.* 570. *Baffington v. Gerrish*, 15 *Mass. Rep.* 156. *Lupin v. Marie*, 2 *Paige*, 169. *Andrew v. Dieterich*, 14 *Wend.* 31. *Cary v. Hotailing*, 1 *Hill*, 311. *Buckley v. Artcher*, 21 *Barb.* 585.)

IV. The facts proposed to be proved, were sufficient to justify the finding, that the goods were procured by false representations, and that the property did not pass. (*Willson v. Foree*, 6 *John.* 110, and cases cited to the third point.)

V. The circumstance suggested in the motion for the dismissal of the complaint, that the action was not commenced until a year had elapsed after the property had passed out of the defendants' possession, is not at all controlling ; for if the right of action accrued immediately on the demand, the action could be maintained, if commenced at any time within the period limited by statute for the commencement of such an action, viz, six years. (*Code*, § 91.)

VI. At common law, the remedy sought in this action would have been obtained by an action of *detinue*. (3 *Bac. Abr.* 133. 3 *Bouv. Inst.* § 3477.) That action lay against one who had had possession of the property, although he may have parted with it at the time when the action was brought. (3 *Bac. Abr.* 135, [B] and cases cited.) When the action of *detinue* was abolished in this state, (2 *R. S.* 573, § 15, *Edmonds' ed.*), the action of *replevin* was so enlarged as to embrace all the remedies provided for by that section, (*id.* 540, § 1 ; see also the *Revisers' notes*, 5 *R. S.*

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496; *Barrett v. Warren*, 3 *Hill*, 348.) Replevin, under the Revised Statutes, was maintainable, although the defendant may have parted with the possession of the property before the action was commenced. (2 *R. S.* 542, § 11. *Id.* 548, § 49.) The first of these sections provided for the arrest of the defendant, in case the property had been removed or concealed so that the sheriff could not make delivery thereof. The other provided for the kind of judgment to be entered in case the property could not be delivered to the plaintiff. The following are the leading cases under those statutes, holding that this action could have been maintained before the Code. (*Snow v. Roy*, 22 *Wend.* 602. *Cary v. Hotailing*, 1 *Hill*, 311. *Olmsted v. Hotailing*, *Id.* 317. *Ely v. Ehle*, 3 *Comst.* 506.) It seems obvious that the provisions of the Code entitled "Claim and Delivery of Personal Property," are and were designed to be a substitute for the old action of replevin. The clear import of the provisions would lead to that conclusion, were we without any direct authority upon the point. But we have the clear and positive declaration of the Commissioners of Practice, &c. in 1848, page 169, sustained by the following adjudications under the Code: (*Roberts v. Randell*, 5 *How. Pr. R.* 327, *affirmed at Gen. Term*, 3 *Sandf.* 707. *Chappel v. Skinner*, 6 *How. Pr.* 338. *Rockwell v. Saunders*, 19 *Barb.* 481. *The N. B. Co. of France v. Carpentier*, 4 *Abb. Pr. R.* 51. *Ross v. Cassidy*, 27 *How. Pr.* 416. *Nichols v. Michael*, 23 *N. Y. Rep.* 264. *Porter v. Willet*, 14 *Abb. Pr. R.* 319.) These authorities would seem to show that possession of the property sought to be recovered need not be shown at the time of commencing the action. But a reasonable construction of the Code will make it more obvious. The doctrine of the learned justice who tried this cause would deny the action for the recovery of personal property in that large class of cases where a demand is necessary; for an immediate transfer of possession would require a new demand, and a new defendant, and he, in turn, might transfer possession while the

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action was being commenced, and a new demand and a new defendant would be required, and so on *ad libitum*. Section 277 of the Code prescribes the form of judgment in case delivery cannot be had. And section 179, subdivision 3, seems to put the question at rest. It provides for an arrest "in an action to recover personal property unjustly detained, where the property, or any part thereof, has been concealed, removed or disposed of, so that it cannot be found or taken by the sheriff," &c. and this, be it remembered, is at the commencement of the action. By the ruling of the learned justice in this action, that provision of section 179 would be rendered wholly inoperative, which section may be regarded as a legislative definition of the action under the Code, in harmony with the plaintiffs' position. The following cases since the Code are directly in point: (*Brockway v. Burnap*, 16 Barb. 309. *Ross v. Cassidy*, 27 How. 416. *Van Neste v. Conover*, 20 Barb. 547. *Ward v. Woodburn*, 27 id. 346. *Nichols v. Michael*, 23 N. Y. Rep. 264. *Jessop v. Miller*, in Court of Appeals, decided June term 1864, not yet reported.) In *Ross v. Cassidy*, above cited, the learned justice who gave the opinion of the court says, upon the identical point under consideration in this action: "The fact that he (the defendant) had, before demand, sold the goods in good faith, and without knowledge of the claim, could not affect the owner's right to hold him responsible for them." Much less should it affect the plaintiff's right in this action, where the defendant parted with the possession wrongfully, and was the fraudulent possessor. In *Nichols v. Michael*, it appeared that the goods, for the recovery of which the action was brought, were purchased by one of the defendants of the plaintiff, in April, 1863, and that the defendant continued business until August following, when he made an assignment for the benefit of his creditors. It was objected that the action could not be maintained against the assignor, because he had parted with the property to the assignee who was in possession. It did not appear how much of the prop-

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erty was on hand, or how much had been sold ; the court held "the legislature did not intend by the Code to abridge the former action of replevin, as they found it ; and nothing therein prevents the present remedy by an action to recover personal property, being as full, and complete as that action was under the Revised Statutes. An action, properly, lay against Pinner, notwithstanding he had assigned and delivered the property to Michael."

*A. R. Dyett*, for the respondent. There is only one point in the case, and that is, the judge properly nonsuited the plaintiff. (*Nash v. Fredericks*, 12 *Abb. Pr.* 147.) The case of *Nichols v. Michael*, (23 *N. Y. R.* 264,) does not conflict with *Nash v. Fredericks*. The court was not called upon to decide the point in question. The goods had been assigned to an assignee, for the benefit of creditors, who was *not* a *bona fide* purchaser for value, and was a *defendant* in possession of the property ; and the only point argued or decided was, whether the assignor in *such a case* was properly a co-defendant, and the court held he was, because he was guilty, equally with the assignee, of the detention of the property. At common law, originally, replevin lay only to recover possession of property distrained. It was always a possessory action, and so continues. Its object always was to recover the property itself. Detinue also lay to recover the property itself, where it was other than a distress, and was unlawfully detained, whereas, in trover and trespass, damages only were recovered. Replevin, in England, finally, was allowed for property detained—at least, so the courts in Massachusetts decided, though those in this state decided otherwise. (*Morris on Replevin*, 37, 38.) Our Revised Statutes definitely settled the point, but did not change the elements or character of the action. If the case of *Brockway v. Burnap*, (16 *Barb.* 309, doubted, if not overruled, in *Nash v. Fredericks*, *supra*,) really does hold that replevin will lie where, at the time of the commencement of the action, the defendant had neither

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possession nor control of the property, it is not only the first and only case so holding, but no case can be found where the action was maintained in such a case, or in which a recovery was had, unless it was *sub silentio* as to the point.

At common law, if the distress was eloiigned, or removed into another county, so that the sheriff could not take the beasts (but still they were in the possession of the distrainer,) the writ of *withernam* issued to take other beasts of the distrainer and hold them until he made deliverance to the sheriff of the original distress, (*Jacobs' Catalogue of Writs*, p. 120,) or the party might go on with the action to judgment, and then get return or value. But no instance can be found in which this writ was allowed after sale of the distress, or other absolute disposition and parting with entire control and possession of the property. All the common law writs and plaints in this action, all the English statutes, the declarations, pleas, verdicts, judgments, and executions, concur in establishing that the very existence of the action depended upon the property being in the possession or under the control of the defendants, and that the great object of the action, and its distinctive feature, was the recovery of the property itself, and its delivery to the plaintiff at the commencement of the action. (*Morris on Replevin, opening chapter.*)

Coming down to our own time, our statutory provisions bear concurrent testimony to the same point. See R. S. 522 ; §§ 1, 2, 3, 4, 5, as to object of action ; § 6, the writ by which commenced ; § 10, applying to removal or concealment of property ; § 12, as to bond in such case to abide the judgment, which, by § 49, must always for plaintiff be for the return ; but no provision is made for case of *absolute disposal* by defendant, prior to the issuing of the writ, to which the proceedings just named would be inapplicable as well as unjust ; §§ 53 and 55, showing judgment for the defendants, and that he (and not the plaintiff,) may waive return ; § 36, showing form of declaration ; and see, generally, the whole of *title 12*, as specially applicable to, and contemplating in its whole

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scope, the property in defendants' possession. And see, also, Code, §§ 206, 507, sub. 3, (affidavit,) § 209—"if in possession of defendant, or his agent;" § 211, reclamation by defendant; §§ 212, 215, as to keeping property; § 214, as to breaking building, &c.; § 179, sub. 3, provides for concealment, removal, or disposition of a particular kind, but when taken in connection with §§ 188, 189, and 211, shows it clearly contemplates that the property is, nevertheless, in the possession or under the control of the defendant.

Nor is any provision made in the Code for the case of an absolute disposal and parting with entire possession and control of the property before the commencement of the suit. These views are sustained by the cases of *Roberts v. Randel*, 5 How. 327. *S. C.* 3 Sand. p. 707. *Elwood v. Smith*, 9 How. 528. *Bowman v. Eaton*, 24 Barb. 528. *Brockway v. Burnap*, 8 How. 188. *S. C.* 12 Barb. 347. *Van Nest v. Conover*, 5 How. 148. *King v. Orser*, 4 Duer, 431. *Chappel v. Skinner*, 6 How. 338. *Maxwell v. Farnam*, 7 id. 236. 1 *Dallas*, 157. 14 *Serg. & R.* 25. 2 *Rawle's R.* 248. *Morris on Replevin*, 37, 38. *Bower v. Tallman*, *Watts & S.* 561. See also 2 *Fairfield*, 28. 5 *Ohio R.* 202. *Mulvey v. Davison*, 8 How. 111. *Pike v. Lent*, 4 Sand. 650.

Ejectment bears the same relation to real estate as replevin to personal. It will not be pretended that ejectment would lie against a party who had once been in possession, claiming title, but had conveyed all his interest in the land, and was not in possession at the commencement of the action; and yet the cases are strictly analogous.

*By the Court*, INGRAHAM, J. The only question in this case, is, whether an action for claim and delivery of personal property can be maintained against the wrongdoer after he has parted with the possession of the property.

Contradictory decisions have been made on this question, in the Superior Court, and at different terms of the Su-  
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preme Court; and the only source from which a settlement of this question can be obtained is the decision of the Court of Appeals on this point. I do not deem it necessary to review the decisions of this court. In *Nichols v. Michael*, (23 N. Y. Rep. 264,) this question was examined. One ground on which the defendants moved for a dismissal of the complaint was, "That it appeared that at the time the action was commenced, the defendant had delivered over the goods to Michael, and he could not be responsible in the action." The motion was denied, and the defendant appealed. JAMES, J. says: "Some conflict has existed, in the courts, on this question whether an action under the Code could be maintained to recover possession of personal property when the defendant had not the possession either in law or in fact at its commencement." After referring to the cases in 3 *Sandf.* 707; 8 *How.* 188; and 9 *id.* 528, he says, the case of *Brockway v. Burnap*, (8 *How.* 188,) was reversed at general term, (16 *Barb.* 309,) and the court held that an action to recover personal property could be maintained, notwithstanding the defendant had wrongfully parted with the possession, before the suit was commenced. This we think is the better rule; and we concur in the view therein expressed, that the legislature did not intend, by the Code, to abridge the former action of replevin as they found it. In this view of the case, the action properly lay against Pinner, notwithstanding he had assigned and delivered the property to Michael. In the same case, Selden, J. says, p. 270: "It is insisted that an action to recover the possession will not lie against Pinner, because he was not in possession at the time of the commencement of the suit, and because his possession was rightful, &c. These objections are, I think, sufficiently answered by the cases, 5 *Car. & Pa.* and 9 *Mees. & Wels.* 19. In the latter case, Parke, B. says: "Detinue does not lie against him who never had possession of the chattel, but it does against him who once had, but has improperly parted with the possession of it." And again he says: "If the goods were fraudulently

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obtained, he had no right to retain possession for one moment, and could transfer no such right to his assignee."

A later case was that of *Jessup v. Miller et al.* not reported. In that case it was proved that one of the defendants had parted with the property before suit brought, and that the defendant requested the court to charge the jury that there was no evidence to show that this defendant had the possession or control of the property at the time the suit was commenced. The court declined so to charge, and the jury found for the plaintiffs. Afterwards a new trial was granted, upon the ground, as to this defendant, that the judge erred in refusing so to charge the jury. This order was appealed from, and affirmed by the general term. An appeal was then taken to the Court of Appeals. MULLIN, J. delivered the opinion of the court, holding the granting of a new trial erroneous, and the order was reversed and the ruling at the trial was affirmed.

These decisions, I think, establish the doctrine that an action for claim and delivery of personal property may be brought against the wrongdoer, although he has parted with the possession of the property before the commencement of the action.

This case comes within the rule. The defendant was charged with fraudulently obtaining the plaintiff's property, and with having placed it on board of a vessel and consigned to his uncle in London, and that the defendant had drawn drafts upon the bill of lading, payable when it should arrive. The plaintiff had a right to ask a jury to pass upon these questions, and, if they found the transaction to be fraudulent, to recover in this action.

I think the court below erred, and the judgment should be reversed, and a new trial ordered, costs to abide the event.

[NEW YORK GENERAL TERM, April 1, 1867. *Leonard, Ingraham and Sutherland*, Justices.]

CHARLES B. MANUEL, plaintiff in error, *vs.* THE PEOPLE,  
defendants in error.

On the trial of an indictment for murder, the judge charged the jury that they were to decide "whether it was murder, or whether it was a case of justifiable or excusable homicide." After defining the crime of murder, he told them the intent must be clearly proven, or they could not convict of murder. He then explained to the jury the law as to justifiable and excusable homicide, and submitted to them whether the prisoner was justified in using a deadly weapon. He also told the jury if they had any doubt as to which degree of murder to convict the prisoner of, it was their duty to convict of the lesser degree of guilt. That if they had any reasonable doubts that the prisoner intended, at the time the blow was struck, to take life, and they believed it was done in the heat of passion, then they could convict of the lesser degrees. *Held* there was no error in the charge.

In criminal cases the court is required to order a new trial, if it is satisfied that the verdict is against evidence, or against law, or that justice requires a new trial.

Where the court, upon a writ of error, came to the conclusion from an examination of the evidence, that under any view to be taken of the case, the homicide was only one of killing in the heat of passion, arising out of a sudden quarrel, without a design to effect death, by a dangerous weapon, and therefore was only manslaughter in the third degree; *Held* that a conviction of murder in the first degree was not warranted by the evidence, and that under such circumstances it was the duty of the court to order a new trial.

THE prisoner was tried in the court of general sessions, and was convicted of murder in the first degree. The evidence showed that the homicide took place in a shoemaker's shop, in the basement of 46, Thompson street. There was nothing proven to show any previous ill feeling between the prisoner and the deceased. The death was caused by stabbing, and witnesses in the street saw the prisoner in front of the deceased and making a motion with his hand. Afterwards both came out of the shop, and the deceased said the prisoner stabbed him. There was a man in the shop with the prisoner, who was in court at the trial, but was not examined. There was evidence tending to show that the deceased struck the prisoner two blows with a hammer, one on the forehead and one on the back of the head, and the physician proved that the wounds still remained on the prisoner's head, after he was in prison.

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The judge charged the jury that they were to decide "whether it was murder in the first degree, or whether it was a case of justifiable or excusable homicide." After defining the crime of murder, he told them the intent must be clearly proven, or they could not convict of murder.

The judge then explained to the jury the law as to justifiable and excusable homicide, and submitted to them whether the prisoner was justified in using a deadly weapon.

He also told the jury, if they had any doubt as to which degree of murder to convict the prisoner of, it was their duty to convict of the lesser degree of guilt. If they had any reasonable doubts that the prisoner intended, at the time the blow was struck, to take life, and they believed it was done in the heat of passion, then they could convict of any of the lesser degrees. The jury found the prisoner guilty of murder. When asked on what degree, they answered as charged in the indictment.

*C. A. L. Goldey*, for the prisoner.

*A. Oakley Hall*, (dist. att'y,) for the people.

*By the Court*, INGRAHAM, J. I see no error in the charge of the judge. It was undoubtedly strong against the prisoner, but I see nothing which would justify a reversal on that ground. The objection that he did not tell the jury the various degrees of murder in the second degree, and of manslaughter, can hardly be called error. He did tell them, if they had doubt as to which degree of murder he was guilty of, they should convict of the lesser degree, and if they had doubts of the intent to take life, they could convict of one of the lesser degrees. If the jury had entertained such doubts, they would certainly have convicted of some other crime than that of murder in the first degree, and if necessary would have called for further instructions on that point.

But while I see no error on the part of the judge who pre-

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sided at the trial, I cannot resist the conclusion, from an attentive examination of the evidence, that under any view to be taken of the case, the homicide was only one of killing in the heat of passion, without a design to effect death, by a dangerous weapon, and if so was only manslaughter in the third degree. Perhaps, if the definition of this offense had been given to the jury, they would have more clearly seen the distinction between that offense and murder. It was not claimed on the part of the prosecution that there was any premeditation, and there was no evidence to show any intent to take life, except it be inferred from the weapon used, and the nature of the wounds. When we consider the facts as detailed to us, viz. the possibility of blows struck by the deceased on the prisoner's head with a hammer, leaving wounds down to a time shortly before the trial; the fact, that the prisoner had no weapon of his own; the evident want of knowledge on the part of all when they left the cellar or shop, that death would ensue from the wounds, it is very difficult to say that the jury have not erred in convicting of murder in the first degree.

We are required, in cases of this kind, to order a new trial, if the court is satisfied that the verdict is against evidence, or against law, or that justice requires a new trial.

I cannot say that I am satisfied with this verdict. I think there is such a want of proof of intent, and especially when I connect with it the character of the prisoner, that I cannot avoid the conclusion that the whole was an affray arising out of a sudden quarrel, without previous provocation, and that a conviction of murder in the first degree was not warranted by the evidence.

Under such a view of the case, it is the duty of the court to order a new trial.

Judgment reversed, and new trial ordered, in the sessions.

[NEW YORK GENERAL TERM, April 1, 1867. *Leonard, Ingraham and Sutherland*, Justices.]

THE PEOPLE, *ex rel.* John Gleahill and others, *vs.* CHARLES  
SCHACKNO.

Where a parol agreement provided for the renting of premises for one month from the 1st of August, 1866, and for each successive month thereafter until the landlord should want the premises for his own use, whereupon the tenancy should expire; *Held* that under such an agreement a notice of thirty days was not necessary to terminate the tenancy.

The notice served by the landlord upon a tenant at will, to terminate his tenancy, takes effect in thirty days after the service; and the specification therein of a day on which the time will expire, which will be less than thirty days from the time of service, will not vitiate the notice.

**C**ERTIORARI to review proceedings for the summary possession of real estate, instituted by a landlord against his tenant at will.

*By the Court, INGRAHAM, J.* The agreement in this case was by parol, and provided for the renting of the premises for one month from the 1st of August, 1866, and for each successive month thereafter until the landlord should want the premises for his own use, whereupon the tenancy should expire. The notice was given on the 3d of October, 1866, and that the tenancy would expire on the 31st October, 1866. The landlord's proceedings were taken 14th November, 1866.

This can hardly be called a tenancy at will or by sufferance, created by the tenant's holding over his term, or otherwise. It is an agreement for an indefinite number of months, subject to be terminated by a notice from the landlord that he wants the premises. The termination of the letting was to take place when that fact was made known to the tenant. Under such an agreement a notice of thirty days was not necessary. This is so stated in *Park v. Peet*, (14 Barb. 253.) If this can be called a tenancy at will, still it contains the special provision that it shall cease on the happening of a certain contingency, which takes it out of the operation of the statute.

But if it be a tenancy at will, the statute only requires a

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month's notice to terminate it, and the insertion of the 31st October as the day which would expire, although less than thirty days, did not vitiate the notice. It took effect in thirty days after the service. That was prior to the commencement of these proceedings. (*Burns v. Bryant*, 31 N. Y. Rep. 453.)

My conclusion is, that a notice of thirty days was not necessary under this letting, and that the judge below was correct in his rulings.

Proceedings affirmed.

[NEW YORK GENERAL TERM, April 1, 1867. *Ingraham, Leonard and Sutherland*, Justices.]

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JONES vs. SMITH.

It inevitably follows from the act of congress commonly called the legal tender act, and from the decisions of the Court of Appeals of this state affirming the constitutionality of that act, that a bill of exchange payable "*in specie or its equivalent*," may be paid in legal tender notes, commonly called greenbacks.

THE plaintiff is the third indorser, and the owner of a certain bill of exchange, drawn upon and accepted by the defendant. The bill of exchange, on which this action is founded, is as follows:

\$218.67.

"NASSAU, N. P. November 19th, 1864.

W. HIGBIE SMITH, Esq., 171 Pearl street, New York.

Sir: At one day's sight, pay to the order of Messrs. Sands & Son, the sum of two hundred and eighteen dollars sixty-seven cents, in specie or its equivalent, being in lieu of a draft, said not to have been received, dated June 4th, 1864, *balance of freight money* as per account rendered for schooner *Eliza*. Either of which being paid the other to stand void.

Yours respectfully, JAMES BAKER SMITH."

Written across the face, "Nov. 29th, 1864. Accepted. Wm. Higbie Smith, 171 Pearl st."

(Indorsed) Sands & Son, Wm. Sands & Son, Walter Jones.

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On the 3d day of December, 1864, on the maturity of the bill, it was presented for payment to the defendant, at 171 Pearl street, in the city of New York, and the defendant thereupon offered to pay, and tendered in payment the whole face of the bill, being \$218.67, in United States treasury notes, commonly called legal tender notes or greenbacks, and the plaintiff refused to accept the same in payment of said bill. After the commencement of this action, and on the 4th day of January, 1865, the defendant tendered to the plaintiff the sum of \$247, in the said United States treasury notes, in payment of the bill, with interest, costs and disbursements, and the plaintiff refused to receive the same. Afterwards, on the 11th of January, 1865, the defendant made an offer in writing to the plaintiff, pursuant to section 385 of the Code, to allow judgment to be entered against him in this action by the plaintiff, for the sum of \$218.67, with interest from December 3, 1864, with costs, which offer was not accepted by the plaintiff. The cause came on for trial on the 9th day of May, 1865, before the Hon. WILLIAM H. LEONARD, one of the justices of this court, a jury being waived. On the trial the plaintiff offered to prove the premium on specie, on the 3d of December, 1864. The defendant's counsel objected to this proof as irrelevant and inadmissible. This objection was overruled and exception was taken. On the 18th of May, 1865, the justice before whom the case was tried, signed and filed his decision in writing, finding as matter of fact, that on the maturity of the bill specie was at a premium over United States treasury notes of one dollar thirty-three and three quarters per cent, and that, at that premium, the amount due on said acceptance, at its maturity, was the sum of \$504.50, which was then the equivalent of the sum of \$218.67 in specie. To this finding exception was duly taken. Judgment was accordingly rendered for the plaintiff on this basis, for the sum of \$520.46, on the 18th of May, 1865.

From this judgment the defendant appealed to this court.

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*Spring & Wetmore*, for the appellant. By an act of the congress of the United States, passed February 25, 1862, the secretary of the treasury was authorized to issue on the credit of the United States, one hundred and fifty millions of *dollars* of United States notes, not bearing interest, payable to bearer at the treasury of the United States, and it provides that these notes shall be "lawful money, and a *legal tender in payment of all debts*, public and private, except," &c. (12 *U. S. Stat. at Large*, p. 711.) The validity of the act of congress above referred to, is not now open to discussion in this state. The counsel for the appellant assumes its constitutionality and binding force; and it only remains to inquire how far its legal operation determines the rights of the parties now before the court. (*Metropolitan Bank v. Van Dyck*, 27 *N. Y. Rep.* 400. *Meyer v. Rosevelt*, *Id.*)

I. The exception taken by the defendant to the admission of evidence as to the *premium* on *specie* on the 3d of December, 1864, and the third exception taken by the defendant to the findings of fact, and also the defendant's first exception to the judge's conclusions of law, were, each and all of them, well taken and should be sustained by this court. These exceptions are all based upon the idea that by force of the legal tender act of congress, payment or tender of the face of the acceptance in United States treasury notes, was a sufficient and full discharge of the acceptance. 1. The contract of acceptance in this case created a *debt* on the part of the defendant. The ordinary and legal acceptance of the term *debt* imports a sum of money arising upon contract express or implied. (3 *Black. Com.* 154. *Com. Dig.* title *Debt. Bac. Abr.* same title. *Denny v. Manhattan Company*, 2 *Hill*, 220. *Wilson v. Morgan*, *N. Y. Superior Court*, 1 *Abb. Pr. Rep. N. S.* 174.) The bill of exchange accepted by the defendant expresses upon its face that it is given for a pre-existing *debt*; namely, a "balance of freight money due" by the schooner *Elisa*. The bill simply *represents that debt*, and has no other consideration to support it.

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The only effect and object of the bill was to specify the time and mode of payment of this debt, or money already due; and the indebtedness itself remains until the bill is paid. If the freight money in question had been demanded of the defendant in the city of New York, on the 3d of December, 1864, it could unquestionably have been paid by these United States notes. Why, then, should not the acceptance, based upon and representing the *same* indebtedness, be discharged in like manner? (2 *Pars. on Cont.* 197. 7 *Ellis & B.* 903. *Burdick v. Green*, 15 *John.* 247. *Wilson v. Morgan*, 1 *Abb. Pr. N. S.* 174.) The nature of the obligation incurred in this case by the defendant, as an obligation for a *debt*, is not in any degree varied or affected by the promise to pay "in specie or its equivalent." If these words had been omitted, the legal effect of the contract would have been the same. By the laws regulating our currency, when this bill was accepted, any acceptance or other contract to pay money necessarily implied the idea of payment "in specie or its equivalent." It can hardly be contended that the nature of the contract, or the extent of the obligation incurred, is altered by expressing in direct terms precisely and only that which the law would at all events imply. 2. The obligation of the defendant being, as we have shown, a *debt*, these United States treasury notes are, by virtue of the laws of the United States, competent *legal tender* in discharge thereof, and at *their nominal value*. Any other construction, and especially the one which seems to have been adopted in the decision of this case, namely, that these notes are only to be taken at their *market* value relatively to specie, would defeat the plain object and purpose of the law. It was evidently the intention of congress to strengthen and establish the credit of government by giving its notes a *fixed* and *certain* value, equivalent in every sense to specie, for all purposes except the payment of duties and interest on the public debt. To subject these notes to the daily fluctuations of the Wall street market, and to depreciate them by the speculative

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premium on specie caused by "operations" in the brokers' offices, would be to defeat the intention of congress and to damage the credit of the government. Their certain and fixed value, as equivalent to specie, for the payment of debts, can only be applied by regarding and sustaining them at their nominal value.

Money has two purposes and two corresponding values. It is used as a circulating medium in payment of debts, and for this purpose it has, and of necessity must have, a fixed, arbitrary, standard value, measured by an established unit. In this respect it is maintained by law at its established value, and does not fluctuate. As lawful currency, its value as fixed by law does not change with the mutations of trade and commerce. Money is, however, also trafficked in and bartered as a *commodity*. In this character its value fluctuates with the changes of the times, and acquires a *market value*, often very different from its standard or legal value. For the purpose of paying debts, the standard value of money is the only value known to the law. It is the value fixed by statute; and no court can look beyond the statute. For this purpose, its value is not a matter of *evidence*, but a *question of law*; and it is irrelevant and improper to admit evidence as to its market value, when its value, as a means of discharging debts is the only point at issue. The congress of the United States, by the act of 25th February, 1862, has in effect made these treasury notes for the payment of debts, of equal value with gold and silver coin. It has impressed upon them, by the highest authority known to the law, a fixed standard value, making the paper dollar the exact equivalent of a gold or silver dollar. Having created this paper money, and rendered it nominally, for all legal purposes as currency, equal to gold, there no longer remains, in legal contemplation, any difference between them. 3. If the above positions are sound, it follows that the tender by the defendant of the amount of his acceptance in United States notes, was the same in legal contemplation as a tender

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of the same amount in specie. The offer of the defendant to allow judgment to be taken against him for the face of the bill, with interest and costs, was also a valid offer and should have been accepted by the plaintiff. The justice, at the trial, should have given its proper effect to this offer, and erred in the judgment rendered in this respect.

II. By a proper construction of the meaning and import of the bill of exchange in this case, and an application of familiar principles of law, it will appear that the parties intended, and must be deemed to have intended, that the defendant, at the maturity of the bill, should have the option of paying either in specie or in the United States notes. His offer of payment was therefore in exact accordance with the terms of his acceptance, and was rejected by the plaintiff at his peril. 1. The bill was drawn at Nassau, in November, 1864, two years after the passage of the legal tender act of congress. It was drawn upon the defendant at New York, and was to be paid in the city of New York. The meaning of the contract, and the obligations growing out of it, were to be determined by the laws of this state; and the parties are presumed to have made it with reference to the existing laws of this state. 2. At the time when the bill was drawn and accepted, and also when it matured, these treasury notes were by law the "equivalent" of specie, and the acceptor had the legal right to pay the acceptance either in specie or in these notes. It is to be assumed that when they made this contract they were cognizant of the laws of the United States in this behalf. They must be deemed to have intended to contract in obedience to our laws rather than in opposition to them. (*Wilson v. Morgan, supra.*)

III. If, however, the contract in this case was expressly to pay the face of the bill in specie, or in lieu thereof as many dollars in treasury notes as should represent the *market value* of the face of the bill *in specie* at its maturity, such a contract is contrary to the policy of the legal tender act, and cannot be applied or enforced either at law or in equity.

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1. When a contract is contrary to law, or when its tendency and practical effect is to nullify its operation and defeat its object—or when it attempts to do or regulate in one way that which the legislature has determined, for reasons affecting the general welfare, shall be done in another—the law pronounces the contract void. (*Schoenberger v. Watts, Am. Law Reg. N. S. vol. 1, p. 553. Kneetle v. Newcomb, 22 N. Y. Rep. 249. Crawford v. Lockwood, 9 How. Pr. R. 547.*) 2. The legal tender act being one intended, in the wisdom of congress, to uphold the credit of the government, and to establish a financial policy for the benefit of the whole country, whereby the privilege was conferred of paying debts by these treasury notes, equally with specie, no executory agreement waiving that privilege can be upheld. (*Schoenberger v. Watts, supra. Carpenter v. Atherton, 28 How. Pr. R. 318. Kneetle v. Newcomb, 22 N. Y. Rep. 249. Meyer v. Roosevelt, 27 id. 400. Metropolitan Bank v. Van Dyck, Id.*)

IV. The judgment in this case cannot be sustained on any idea of a *specific performance* of the agreement, as prayed for in the complaint. 1. The prayer for specific performance is unwarranted by the case made by the complaint. There are no proper allegations in the complaint justifying an appeal to the equity powers of the court in any particular. The complaint sets forth an ordinary action of assumpsit on a bill of exchange, and the only prayer pertinent to the case, or which the law can regard, is for judgment for the amount of the debt, in dollars and cents, with interest and costs. There is nothing in the nature of a bill for specific performance in the case. 2. Equity will not, even in an application proper in form in this behalf, decree specific performance, unless something is, by the terms of the contract, to be done *besides the payment of money*. In every instance in which specific performance may be decreed, the whole or some part of the injury inflicted is, from the *nature* of the contract, not susceptible of a *money measurement*. In the present

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case the whole injury may be measured in money, the only question being as to the *amount* to be paid, and in this respect equity will not interfere with the legal assessment of damages. (*Sedgwick on Dam.* 10. *Turpin v. Burnton, Hardin*, 312.) 3. The objections which have been urged against the *validity* of these contracts, apply without reference to the tribunal in which relief may be sought. If those objections are valid, they preclude courts of law and equity alike from enforcing them or granting any relief. 4. The Revised Statutes provide that all judgments or decrees for any "debt, damages or costs" rendered by any court of justice shall be computed in "dollars and cents." They do not authorize any decree for any particular *kind* of dollars. (2 *R. S.* 833, 5th ed.)

V. The questions of law involved in this controversy have been adjudicated in this and in other states in conformity with the views for which the defendant contends. The value of these United States treasury notes, as the lawful equivalent of specie for all the purposes of *currency* in the payment of debts, is emphatically asserted in *Meyer v. Roosevelt*, and *Metropolitan Bank v. Van Dyck*, (27 *N. Y. Rep.* 400.) Judge Balcom (p. 471) says: "It (the act of congress) makes the notes issued under it as valuable as gold coin in the hands of every person receiving them, for all commercial purposes and for the payment of debts, &c. I, of course, lay out of view the difference created by brokers and speculators between the value of gold coin and these notes, as having no legitimate bearing upon the question. That difference cannot be regarded, because it is *not recognized by law*, and all agreements to pay any such difference are *utterly void*." "Each five dollar note issued under this act is *precisely* of the *same value*, in legal contemplation, as a piece of gold coin of the denomination of five dollars," &c. &c. Judge Wright (p. 482) says: "A treasury note of the denomination of ten dollars is legally as valuable for the purposes of money as a coined eagle. The value of each is fixed at ten

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dollars money of account." (See also *Hague v. Powers*, 39 Barb. 427; *Schoenberger v. Watts*, 1 Am. Law Reg. (N. S.) 553, July, 1862; *Schollenberger v. Brinton*, 3 id. 591, August, 1864; *Wassenbold v. Schlieting*, 16 Iowa Rep.; *Wilson v. Morgan*, (N. Y. Sup. Ct. Gen. Term,) 1 Abb. Pr. R. (N. S.) 174; *Carpentier v. Atherton*, 28 How. Pr. R. 318. *Kneetle v. Newcomb*, 22 N. Y. Rep. 249; *Kempton v. Bronson*, (Buffalo Gen. Term,) newspaper slip, and *Rhodes v. Bronson*, (Ct. of Appeals, January, 1867.)

VI. Each and all the exceptions taken by the defendant to the findings of fact and to the conclusions of law of the justice who tried this case, were well taken, and should be sustained by this court.

VII. No argument adverse to the views above expressed can be drawn from any distinction between contracts of this nature made *before* the passage of the legal tender act, and those made *after* its passage. The argument against the validity of the latter seems to us stronger and more manifest than that against the former. If a contract made *before* the passage of the law, when it was confessedly legal, when no intention of contravening the policy of the government could be alleged, and when, in fact, there was no such policy to contravene—if such a contract is rendered nugatory by the subsequent legislation of congress, and is by law compelled to yield to such legislation, *a fortiori*, such a contract made *after* the passage of the law, in derogation of the declared policy of the government and with the tendency, if not with the intent of evading and defeating such policy, must be condemned and declared void.

VIII. The fact that congress has seen fit, in certain specified cases and for certain purposes, to recognize a difference between specie and paper, does not, when properly viewed, affect the soundness of the appellant's argument in this case. 1. The fact that congress has recognized such difference in such cases as in its wisdom seemed best, by fair implication excludes its application in any other than such specified

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cases. 2. Congress has the power to make such special and exceptional recognition and to provide for such cases ; but no private individual has any such right. Any such attempt on the part of the citizen, and any recognition of such right by our courts, would manifestly tend to defeat the will of congress in this behalf.

*Comstock Brothers*, for the respondent. I. This appeal involves no question of constitutional law; only the construction of a commercial contract.

II. The subject matter is a mercantile transaction, and the contract should be construed according to the ordinary use of the language of merchants, for the court will give effect to the intention of the contracting parties, unless it contravenes some statute or public policy.

III. As between the drawer and payees, this bill was equitably intended to transfer a certain value either in specie or some other thing of equal value (specie being practically treated as a commodity,) and was drawn in its peculiar language in express view of the uncertain and fluctuating value of specie as a medium of trade, and as measured by our paper currency. As between the plaintiff and defendant it was an executory contract to carry out that design of the original parties.

IV. The *equivalent* intended was a mercantile one, and had full relation to the *value* of specie as a subject of traffic. No other equivalent would be desirable or is intended in such transactions. Equivalent is defined "a thing of the same weight or *value* ; that which is equal." (*Worcester's Dic.*) That which is of the same *value*, weight, power or force with something else. (*Webster's Dic.*) And *value* is "the quality of a thing which renders it useful, or the property or capability which a thing has of producing some good ; as the intrinsic value of water." (*Worcester.*) "Price : the rate of worth set upon a *commodity*, or the amount for which a

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thing is sold ; we say the value of a thing is what it will bring in the market." (*Webster*.) And commodity is defined, " every movable thing that is bought and sold." (*Id.*) The first finding is therefore a correct interpretation of the contract, and the first exception is not well taken.

V. The face of the draft in United States treasury notes, was not the *equivalent in value*, the *equivalent* intended by the parties, " the price of, nor what it (specie) would bring in market." The refusal to pay more was a refusal to perform the contract. Therefore the fourth finding is correct, and the second exception not well taken.

VI. The defendant had his election, by the contract, to deliver the specie dollars or an *equivalent in value* ; he elected to pay its *value* in treasury notes, but has never done so, or offered to. Whether he had paid, or offered to pay the *equivalent in value*, in performance of his contract, was a proper subject of inquiry and evidence on the trial ; and it was proven by admission that he had neither paid it nor offered to do so. The judge's ruling on this subject, and his fifth finding, are correct, and the fifth and sixth exceptions not well taken. (*Gladstone v. Chamberlain*, *American Law Review*, vol. 1, No. 3, p. 387. *The Rectors, &c. v. Feushelied*, *Id.* 538.)

VII. The legal tender act does not provide that treasury notes shall be equivalent or equal to specie, or of the same value, but simply that they shall be a legal tender in payment of certain debts. It fixes a value on them for that purpose—no other ; and that purpose was manifestly not intended by the parties in making this contract. The court will enforce this contract by holding the defendant to his election, and not frustrate its object and intent by an artificial construction.

VIII. The contract was not to pay a money debt, but to deliver specie as a commodity, or its equivalent (something that would buy so much specie.) If it had been to deliver any other article of merchandise, it is true it might have been discharged by a tender of treasury notes, but only by tender of

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an amount *equivalent in value* to the goods. The plaintiff only contends for the same principle in this case.

These propositions seem so elementary and unquestionable, and the case differs so widely from the gold cases decided, and falls so directly within the spirit of the reasoning of Mr. Justice SUTHERLAND, contained in his opinion delivered in the recent case of *Murray v. Harrison*, that it is deemed unnecessary to cite other authorities.

XI. The findings and conclusion of the court below fully correspond with the intention of all the parties in executing this contract, and the election of the defendant as to mode of payment.

The judgment awards substantial justice, contravenes no statute, and public policy certainly requires the performance of private contracts according to the lawful intent of the parties, and the judgment should be affirmed, with costs.

SUTHERLAND, J. The bill of exchange upon which this action was brought was drawn at Nassau, New Providence, on the defendant at New York city, and was accepted by the defendant, and indorsed to the plaintiff before acceptance and before maturity. By the bill the defendant was directed and required to pay at one day's sight, to the order of Messrs. Sands & Son, (a New York firm,) "the sum of two hundred and eighteen 67-100 dollars, *in specie or its equivalent*, being," &c.

In my opinion, it inevitably follows from the act of congress, commonly called the legal tender act, and from the decisions of the Court of Appeals of this state affirming the constitutionality of that act, that the defendant could discharge his acceptance by paying \$218.67 in legal tender notes, commonly called green backs.

The act of congress provides, that these notes shall be "lawful money and a legal tender in payment of all debts, public and private, except duties and interest on the public debt."

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As between the plaintiff and the defendant, the acceptor, the bill represented or was evidence of a debt of \$218.67, *payable in specie or its equivalent*. The acceptance was in legal effect a promise to pay \$218.67 in specie or its equivalent, one day after sight. By the very terms of the contract or instrument, the acceptor had the option to pay the \$218.67 in specie or its *equivalent*; and by the act of congress, which has been declared constitutional by the Court of Appeals, legal tender notes, commonly called green backs, are made equivalent to specie or gold or silver coin, for the purpose of paying all debts due from one individual or citizen to another. The legal tender act, and the decisions upholding its constitutionality, have in effect made a legal tender note for the payment of ten dollars, ten dollars, for the purpose of paying a debt of ten dollars.

The judgment should be reversed.

LEONARD, J. *Rodes v. Bronson*, (34 N. Y. Rep. 649,) controls this case, and we must follow the decision of the Court of Appeals. The judgment must be reversed, &c.

\* INGRAHAM, J. also concurred.

Judgment reversed.

[NEW YORK GENERAL TERM, April 1, 1867. *Leonard, Sutherland and Ingraham*, Justices.]

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THE PEOPLE, *ex rel.* Richard O'Brien, *vs.* JOHN HEALY  
and others.

An order denying a motion for a commitment for not obeying a mandamus is appealable.

Where the alleged contempt is to be made out from contradictory affidavits, then the decision of the judge at chambers is conclusive; and if he is not satisfied as to the intent of the parties charged, the court, on appeal, would not reverse his decision. But where the contempt is not denied, or where an

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evasive excuse is offered and the judge, notwithstanding, refuses to order a commitment, such an order may be appealed from, and relief may be had in the general term.

*By the Court*, INGEBHAM, J. This is an appeal from an order at special term denying a motion for a commitment for not obeying a mandamus.

The motion is opposed on the ground that such an order is not appealable. I do not assent to that principle. Where the alleged contempt is to be made out from contradictory affidavits, then the decision of the judge at chambers is conclusive, and if he is not satisfied as to the intent of the parties charged, this court, on appeal, would not reverse his decision. But where the contempt is not denied, or where an evasive excuse is offered and the judge, notwithstanding, refuses to order a commitment, such an order is appealable and relief may be had in the general term.

But in looking at the answers of the defendants to the interrogatories, I find that a committee was appointed to inquire into the relator's claims; that they met several times, of which he had notice; that he produced no witnesses before the committee; that his counsel proposed to go into an argument as to their powers, which they did not hear; and that after the service of the mandamus, the board passed a resolution that the other candidate, Houghtaling, was entitled to his seat.

The object of the mandamus was simply to compel the action of the board. It was the duty of the relator to produce any evidence he had to show that he was entitled to the office. His neglect to do so, placed him in the wrong. I do not know that the board are obliged to hear any arguments from counsel on the subject, against their consent. They should hear the evidence and decide. They met for the latter purpose, by their committee, and on the neglect after two or three meetings to produce the evidence, they discharged the committee and passed a resolution that Houghtaling was entitled to the seat. Of this the board was the judge, and

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*Peugnet v. Phelps.*

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having decided the question, they complied with the direction of the mandamus.

Under this state of facts, I think the justice at special term was justified in holding there was no ground for granting the commitment.

At the same time I must say the course of the board in refusing for so long a time a hearing to the petitioner as to his claim, was in effect a denial of justice to him, and was calculated to defeat his claim to the office if he was entitled to it. For this reason no costs should be given on this proceeding.

Order affirmed, without costs.

[NEW YORK GENERAL TERM, April 1, 1867. *Leonard, Sutherland and Ingraham*, Justices.]

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*PEUGNET vs. PHELPS.*

The Supreme Court has no inherent power to declare a marriage contract void, or to decree a limited or an absolute divorce. Whatever power it possesses is given by statute; and it can exercise no power, on the subject of divorce, except what is expressly specified in the statute.

The court has no jurisdiction to declare a marriage void, on the ground that a decree for divorce was obtained against the defendant by her former husband, for adultery; in which decree she was forbidden to marry again until her said husband should be dead; and that in disobedience of this provision she and the present plaintiff went to another state and were there married.

THIS is an action for the purpose of having a marriage declared void, on the ground that a divorce was obtained against the defendant, by her former husband, for adultery with this same plaintiff; that in the decree in which the divorce was ordered she was forbidden to marry again until her said husband should be dead; and that in disobedience of this provision, she and the plaintiff in this action went to Jersey City, in the state of New Jersey, and were there married,

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*Peugnet v. Phelps.*

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according, as appears from the answer, to the rites of the Protestant Episcopal church.

CLERKE, J. This court has no inherent power to declare a marriage contract void ; neither has it inherent power to decree a limited or an absolute divorce. The common law courts, or court of chancery in England, never possessed it. The jurisdiction in relation to marriage and divorce was confined, until very recently, to the ecclesiastical courts ; although parliament frequently granted divorces dissolving the marriage contract for adultery.

Whatever power, therefore, this court possesses is given by statute. It can exercise no power, on the subject of divorce, except what is expressly specified in the statute.

The power to declare any marriage void is contained in chapter 8, part 2 of the Revised Statutes, title 1, article 2. The cases in which it is given are enumerated in that article ; and the case, upon which this application is founded, is not included among them. It appears to me, therefore, clear that this court has no jurisdiction in this matter ; and that to grant the relief demanded would be a plain usurpation of authority.

Whatever may be the punishment to which the defendant is liable for disobeying the command of the court, forbidding her to marry again, is another question, with which I have no concern on the present occasion.

The complaint is dismissed, with costs.

[NEW YORK SPECIAL TERM, April 1, 1867. *Clerke, Justice.*]

JONES and others *vs.* BACH and others.

Legal proof of the identity of the persons appearing before an officer for the purpose of acknowledging the execution of an instrument, is necessary, when the officer has no previous knowledge of them. A mere introduction, at the time, is not sufficient.

When this previous knowledge does not exist, the officer must take satisfactory evidence, under the solemnity of an oath or formal affirmation, of the identity of such persons.

THE question in this case was, whether an assignment of property in trust for the benefit of creditors, was properly acknowledged. The facts are stated in the opinion.

CLERKE, J. It is fully settled, that by the act of 1860, an assignment in trust for the benefit of creditors, must be acknowledged before a proper officer, before delivery. Otherwise it is of no effect. The officer, in taking the acknowledgment, must be governed by the provisions of the Revised Statutes regulating the proof and recording of conveyances of real estate. (1 *R. S.* 758, § 9, 15, *marginal.*) The language of section nine is, "No acknowledgment of any conveyance having been executed shall be taken by any officer, unless the officer taking the same *shall know, or have satisfactory evidence*, that the person making such acknowledgment is the individual described in, and who executed such conveyance.

In the case before me, the acknowledgment was made before Peter J. Gage, a notary public, on the 1st of August, 1866. He testifies that on the said day, he was sent for by Mr. Joachimssen, the counsel of the persons who were to execute the instrument; his office being in the same building with Mr. Joachimssen. They were then first introduced to him by that gentleman; they then executed it, in his presence. He had no doubt, from knowing Mr. Joachimssen, that they were the gentlemen represented in that paper. Consequently, on that introduction, he took the acknowledgment, as a notary public. He had no personal knowledge of them before that day.

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Jones v. Bach.

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Is this the knowledge contemplated in the section of the statute, which I have quoted? Is a mere introduction at the moment of execution sufficient? Is it left to the discretion of the officer to determine what shall constitute the knowledge mentioned in that section? I think not. The object of all these well considered provisions, relative to the proof and recording of conveyances of real estate, was to protect the owners of property, and their creditors, against forgery, as well as to secure the rights of grantees and mortgagees against spurious and fraudulent conveyances. Would this object be effected by the manner in which the acknowledgment in this case was made? Any one could be falsely personated without check, or liability to punishment for crime, if a mere introduction, at the moment, shall authorize the officer to take the acknowledgment. The person who introduces, if this statement is false, only commits a falsehood; but if he is sworn as to the truth of his statement, should it be knowingly false, he is guilty of perjury, and liable to prosecution for a felony. In addition to these considerations, I think an unsworn introduction was not contemplated by the framers of the section, because it says, "shall know or have satisfactory evidence." A person gives *evidence* only on oath; and this evidence is only required where there is no knowledge, which must mean previous knowledge; for if the knowledge acquired only at the moment is sufficient, the clause in the alternative, requiring "*satisfactory evidence*," is superfluous.

These views, or rather the conclusions deducible from them, are, I think, supported by the general term of this district, in *Watson v. Campbell*, (28 Barb. 421.)

I hold, therefore, that legal proof of the identity of the persons appearing before an officer for the purpose of acknowledging the execution of an instrument, is necessary when the officer has no previous knowledge of them; that a mere introduction at the time is not sufficient; and when this previous knowledge does not exist, the officer shall take satis-

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Leavenworth v. Cooney.

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factory evidence, under the solemnity of an oath, or of a formal affirmation, of the identity of such persons.

Judgment for the plaintiffs, in conformity with the prayer of the complaint, with costs.

[NEW YORK SPECIAL TERM, April 1, 1867. *Clerks, Justice.*]

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HENRY C. LEAVENWORTH and others, ex'rs of Patrick Cooney,  
and MARY MCKEEVER, vs. CATHARINE COONEY.

A testator having executed his bond to pay a debt secured by his mortgage upon his real estate, which was also signed by the defendant, (his widow,) devised all his real and personal estate to his executors with directions to sell the same, and *after paying his debts and incumbrances*, to invest a portion of the residue for the benefit of his widow, in lieu of dower. The widow having elected to take dower instead of the provision made for her in the will; *Held* that she took dower only in the equity of redemption, and was liable to contribution towards the payment of the mortgage debt.

*It seems*, however, that if the testator had not been personally liable to pay the mortgage debt, his direction that the same should be paid by his executors out of the proceeds of his real and personal property, would be strong, if not conclusive evidence of his intention to relieve the dower interest of his widow from the burden of contribution.

CASE agreed upon between the parties, and submitted under section 372 of the Code of Procedure.

*Patrick Cooney*, late of Syracuse, died March 4th, 1863, leaving a will which is sufficiently set out in the opinion of the court, and leaving a widow and several children his heirs at law. He left real estate of the estimated value of over \$30,000, which was subject to several mortgages, to the amount of \$10,300. These mortgages were all executed by the defendant, except one, which was given for the purchase money.

The widow elected to take dower instead of the provision made for her in the will, and the same has been assigned to her.

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Leavenworth v. Cooney.

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The question between her and the residuary legatee is, whether she takes dower subject to the mortgages, or whether the mortgages shall be discharged by the executors, and deducted from the residuary devise.

*D. Pratt*, for the plaintiff.

*James Nowon*, for the defendant.

MORGAN, J. The question presented is, whether under the provisions of the will, the widow of Patrick Cooney, having elected to take her dower in the real estate of the testator, instead of the legacy bequeathed to her in lieu of dower, takes the same free from the incumbrances of the several mortgages executed by her husband in his lifetime, and in which she joined; or whether she must bear her share in the burden of paying them off.

The will devises all the real and personal estate of the testator to his executors, in trust, substantially as follows: *First*. To sell the same whenever they deem proper, and a fair price can be obtained. *Secondly*. Out of the proceeds, after paying debts and expenses of execution of the will, and *after paying all incumbrances on such real estate*, the executors are directed to invest the sum of \$5000, and pay over the interest thereof semi-annually to his widow and two children, Daniel and Ellen Cooney, share and share alike. And upon the death of the widow, the principal to be paid over to the two children, share and share alike. The foregoing provision for the widow and children was declared to be made and intended in lieu of dower of his widow in his property. If his widow should demand dower, then the testator directed the five thousand dollars to be paid to the residuary legatee, Mary McKeever, to whom the residue was bequeathed.

It is claimed by the defendant's counsel that the executors are required by the will to sell, subject to the dower of the

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widow, she having demanded it, and also to pay off the incumbrances.

It is evident that the sale contemplated by the testator included the dower interest of his widow in the real estate ; but by reason of the election of the widow to take dower instead of the legacy, the executors cannot carry out his intentions in that respect.

It seems, however, to be conceded that the executors have a right to sell the real estate, subject to the dower right of the widow, in which event they are required to pay the debts, including the incumbrances on the real estate.

Having, therefore, made a provision to create a fund to pay off the incumbrances, it is claimed by the defendant's counsel that the widow is entitled to have the same applied in exoneration of what would otherwise be a charge upon her dower interest. But it is clear that the executors, without any such directions, might be called upon by the owners of the mortgages to discharge the mortgage debts, provided they held the bond or other personal obligation of the testator for their payment. It does not affirmatively appear by the statement of facts in this case, that the testator gave his bond for the debts included in the mortgages. If that fact is material it should appear in the case.

It may be well supposed that the testator did not fully understand the effect of the provision he was making in case his widow should decline to accept it in lieu of dower. But if he had given his bond for the payment of the mortgage debts, as I apprehend was the fact, then it is clear that his executors were liable to the owners of the mortgages without any directions to pay them. And upon payment, the executors could call upon the widow for contribution, unless it appears to have been the intention of the testator to relieve her dower estate from the charge.

Although, as a general rule, the land is the primary fund for the payment of the mortgage debt, as between the widow claiming dower therein and the executors, still I am of the

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opinion that a simple direction of the testator to his executors to pay the mortgage debt out of the avails of his estate, does not imply that it is to be paid in exoneration of the heirs at law, or of the widow claiming dower in the mortgaged premises. If, however, the testator is not personally liable for the debt, a different result might ensue. For why should the testator direct his executors to pay off a mortgage debt out of his estate, when he was not personally liable to the mortgagee, unless he intended it as a gift to the heirs at law or to the widow claiming dower in the mortgaged premises?

Without doubt, the defendant in this case is liable to pay off her proportion of the incumbrances, unless the will has made provision for its payment out of the avails of the sale of his estate, so as to exonerate her dower interest from contribution. There is nothing in the language of the will which manifests any such intention on the part of the testator, unless it is implied in the directions given to his executors to pay off incumbrances. At law she can only claim dower in the equity of redemption; but the testator may by bequest enlarge her estate. His intention to do so should, however, be plainly deducible from the language of the will, before we come to the conclusion that such was his intention.

My own conclusion is, that if the testator was personally liable for the payment of the mortgage debts, his direction to his executors to pay them out of his estate, cannot be construed into a gift of so much thereof as was properly chargeable upon the widow in respect to her dower in the mortgaged property.

If, however, the testator was not personally liable to pay off the mortgages, his direction to his executors to pay them out of his estate would be strong evidence of his intention to relieve the dower interest of his widow from the burden of contribution; and unless capable of some other explanation, would be satisfactory evidence that such was his intention.

If my brethren agree with me in these views, I think we

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should retain the case, in order to give the parties an opportunity to correct the statement of facts, so that we can properly decide it.

(At a subsequent day, the parties submitted an amendment.)

The parties having, by stipulation, amended the statement of facts, by which it appears that the testator executed his bonds at the same time of the execution of the mortgages, to pay the amounts secured by the mortgages, it results from the foregoing opinion, that his widow is chargeable with her proportion of the burden of paying them off. That is, she must contribute towards such payment a sum which will be equal to the value of an annuity for the residue of her life, upon the amount of the principal and interest which was unpaid when her estate in dower commenced by the death of her husband. (10 *Paige*, 159.)

MULLIN and BACON, JJ. concurred.

FOSTER, J. dissented.

[ONONDAGA GENERAL TERM, April 4, 1865. *Morgan, Bacon, Foster and Mullin*, Justices.]

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*HALE vs. HAYS.*

E. agreed to sell and convey to the defendant a house and lot for the price of \$10,500, subject to the payment of a mortgage thereon for \$5000, which the defendant assumed as a part of the purchase money, and agreed to pay the residue, \$5500, in ready made clothing. E. was to convey the property free from all incumbrances, except the said mortgage. There being taxes, to the amount of \$278.24 which were a lien on the property, and E. being unable to furnish the money to pay said taxes, it was stipulated by a written agreement between the parties that the defendant should retain \$650 worth of the clothing, at the invoice price, upon the condition that if E. should pay the taxes within one month from that date, the defendant should deliver the said clothing to E.; but if not paid, within the time, then the defendant

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should have a right to pay such taxes, and appropriate the clothing so retained, to his own use, as his indemnity and remuneration for such payment, without accountability therefor. Clothing to the amount of \$650 was accordingly selected by the defendant and retained for the above purpose, the balance of the clothing delivered to E., and the conveyance of the property closed. E. failing to pay the taxes, within the time, the defendant paid them, and appropriated the clothing to his own use, claiming that the same was forfeited. In an action brought against him, by the assignee of E. for the conversion:

- Held* 1. That the facts did not present the case of a *pledge*; it being of the essence of such a contract that the thing should be delivered as a security for some *debt* or *engagement*; and that it not appearing that the taxes were assessed against E., or that she was in any manner *liable for the payment thereof*, there was no engagement of E. to which the clothing could attach as a pledge.
2. That the agreement should be regarded as a modification of the original contract of sale, whereby the defendant agreed to take the real estate subject to the taxes, and pay therefor \$650 less, in clothing, and gave to E. the option or privilege of acquiring the benefit of the original bargain, by paying the taxes within one month.
3. That an action would not lie against the defendant, for the conversion of the goods; and that the plaintiff was therefore properly consulted.

**A** PPEAL from a judgment entered upon the verdict of a jury. In the spring of 1861, one Lucinda Earl agreed to sell and convey to the defendant a house and lot in the city of Brooklyn, for the price of \$10,500, upon which there was a mortgage for \$5000, which the defendant was to assume as a part of the purchase money, and the residue \$5,500, the defendant was to pay in ready made clothing. The defendant had been carrying on a large ready made clothing business in the city of New York for several years, at No. 363 Hudson street. The clothing with which the defendant agreed to pay said Earl was shop worn goods, unsalable in New York city. The goods were selected and invoiced to the amount of \$5500, in the defendant's store, and there remained in his actual possession, until after the execution of the agreement, hereinafter mentioned. The said Lucinda Earle had agreed to convey the house and lot, free from all incumbrances except the said mortgage. But there were taxes to the amount of \$278.24, which were an

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incumbrance on the property, which said Earl was required to pay and discharge, before the transaction could be closed. The parties being desirous to close the transaction, and said Earl being unable to furnish the money to pay said taxes, it was agreed between the parties that the defendant should retain \$650 worth of the clothing at the invoice price, upon the condition that if said Earl should pay the taxes within one month from that date, and produce and deliver to the defendant vouchers therefor, the defendant should deliver the clothing to said Earl, but if the taxes should not be paid by said Earl, and vouchers produced and delivered to the defendant within that time, then the defendant should have the right to pay said taxes, and appropriate said clothing so retained to his own use, as his indemnity and remuneration for such payment, without any liability or accountability therefor, in any respect whatever to said Earl or any other party. Thereupon, the agreement was executed and delivered by said Earl to the defendant, and clothing to the amount of \$650, according to the invoice price, but of the actual value of only \$300, was selected by the defendant to be retained under the foregoing agreement, and the residue was delivered to the said Earl's agent, and the conveyance of the house and lot was closed. Morris J. Earl, the husband of said Lucinda Earl, acted as her agent in all matters connected with said transactions. The said Earl did not pay or cause to be paid the said taxes or any part of them, and after the expiration of the period of one month from the date of the agreement, the defendant paid the taxes. He then sent word to the said agent of Lucinda Earl, that he had paid the taxes, and that said Earl had forfeited the clothing; but if he would repay the defendant, and take the clothing immediately he might have it. Said agent replied that he had not the money to pay with, and could not take the clothing, and thereupon the defendant appropriated the clothing to his own use. Between three and four months after the defendant paid the taxes, the said agent of said

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Lucinda Earl called upon him, and stated that he was ready to pay the money and take the clothing. The defendant told him he was too late, that the clothing was forfeited, and he must abide by the contract. This was in July or August, 1861. In December, 1864, this action, which was for the conversion of the goods, was commenced.

The complaint alleged that a portion of said clothing, in value at that time \$800, was left in possession of the defendant and pledged to him to secure the payment by said Earl of certain taxes upon said house and lot. That thereafter, and without demand of payment of said taxes or notice to Earl to redeem said clothing, the defendant sold the same at a private sale. That said Earl was not notified of the time, place or manner of said sale, and did not know of it until after it was made and the clothing had been carried away by the purchasers. That said Earl by her agent had demanded the possession of said clothing; that the defendant had refused to deliver the same and had converted the same to his own use. That the value of said goods had increased in the market to a sum amounting to \$2500, to which amount said Earl had been damaged by the defendant's wrongful act in the premises. It also alleged that said Lucinda Earl had set over, assigned and transferred all her claims and demands, including the foregoing, to this plaintiff, who demanded judgment for \$2500 and costs.

The defendant, by his answer, admitted most of the above facts, and alleged that after the expiration of one month from the date of the agreement, to wit, on or about the 16th day of April, A. D. 1861, the said taxes and water rates still remaining unpaid, and being still a lien upon the said house and lot, he, the defendant, paid and discharged the said taxes and water rates and the interest thereon, and received a proper voucher for such payment, and thereafter appropriated said clothing so retained and kept by him, to his own use, as his indemnity and remuneration, for such pay-

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ment, as he was authorized to do by the said agreement, without any liability or accountability therefor in any respect whatsoever, to said Lucinda Earl or any other party, which last mentioned clothing is the same which is mentioned in said complaint.

The defendant further answering, averred on information and belief that the plaintiff was not the real party in interest in this action; that this action is prosecuted for the immediate benefit of Lucinda Earl, who is the real party in interest and in whose name this action ought to have been prosecuted.

At the close of the testimony, on the trial, the court held and decided: 1. That the clause in the agreement, precluding Mrs. Earl from any right of redemption after thirty days, was void.

2. That the defendant had no right to appropriate the goods to his own use.

3. That the only question to be submitted to the jury was as to damages.

4. That the plaintiff was entitled to recover the value of the goods at the time of the commencement of the action, with interest to the time of the trial, less \$278.24, with interest from April 16, 1861. To which several decisions the defendant excepted, separately.

The plaintiff's counsel requested the court to charge the jury that the defendant, by his own showing, converted the goods, and that the only question for the jury was the amount of damages. The court so charged the jury, and the defendant's counsel excepted. The court having charged according to the foregoing rulings and decisions, the jury rendered a verdict in favor of the plaintiff, against the defendant, for the sum of four hundred dollars.

A motion was made upon the judge's minutes of the trial, to set aside the said verdict and grant a new trial upon the exceptions taken by the defendant's counsel, and for the insufficiency of the evidence to sustain the verdict, and for ex-

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cessive damages, which motion was denied by the judge ; to which decision the defendant's counsel duly excepted.

*Charles Cheney*, for the appellant.

*L. A. Fuller*, for the respondent.

*By the Court*, GILBERT, J. The court on the trial decided that the plaintiff was entitled to recover, on the ground that the clause in the agreement of March 11th, 1861, precluding Mrs. Earl from any right of redemption of the clothing, which is the subject of the action, was void, and instructed the jury to find a verdict in favor of the plaintiff for the value of the clothing. It is evident that the court regarded the agreement as establishing the relation of pledgor and pledgee, between Mrs. Earl and the defendant ; that the clause of forfeiture therein was unconscionable, and therefore against public policy, and void. If such was the nature of this agreement, the rule of law applied by the court was correct. (*Story's Bailm.* 345. 2 *Kent's Com.* 583. See also *Civil Code* of 1865, *Field, Noyes & Bradford*, § 1592 ; 27 *How. Pr.* 267 ; 31 *N. Y. Rep.* 403.)

But we think the facts do not present the case of a pledge. It is of the essence of such a contract, that the thing should be delivered as a security for some debt or engagement. (*Story's Bailm.* 300.) Giving to the agreement under consideration a reasonable interpretation, Mrs. Earl was under no liability or obligation to the defendant or to any other person to pay the taxes in question. There is nothing in the language of the agreement importing such liability or obligation. Nor does the recital in it that the parties had agreed that the defendant should retain the clothing as security for the payment of the taxes, afford sufficient ground for an implication to that effect. We think it is more in accordance with the intention of the parties, as manifested by their acts and purposes, to regard this agreement as a modification of the original contract of sale, whereby the defendant agreed to take

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the real estate subject to the taxes, and pay therefor \$650 worth less of clothing, and gave to Mrs. Earl the option or privilege of acquiring the benefit of the original bargain by paying the taxes within one month. Surely it would have been competent for Mrs. Earl and the defendant to have agreed originally, that the latter should pay one price for the property sold by the former, unincumbered by taxes, or another price, how much less soever it might be, for the same property subject to the taxes. Such a contract would be free from all legal objection. If the vendor should be compelled, by his inability to pay the taxes, to take the lesser price, it could not be said that he had thereby been subjected by the vendor to a forfeiture of the greater. (*See Brooks v. Avery, 4 Comst. 225.*) It does not appear that the taxes in question were assessed against Mrs. Earl, or that she was in any manner liable for the payment thereof, unless such liability was incurred by the agreement of March 11th, 1861. In the absence of such liability there was no engagement of Mrs. Earl to which the clothing could attach as a pledge. It may be added that Mrs. Earl never acquired a title to the clothing in question. It was to become her property only upon her conveying the real estate free from taxes. The acts of the defendant, which it is claimed prove a delivery of it to Mrs. Earl in pursuance of the original contract of sale, can have no legal effect by implication, beyond the legal rights of the parties. As, therefore, Mrs. Earl was unable to perform this contract on her part, a modification of it became necessary. This was accomplished in the manner, and with the effect before suggested. There was no pledge in fact, nor was any intended, for the simple reason that the property was not Mrs. Earl's but the defendant's. It follows, therefore, that the plaintiff ought to have been nonsuited.

New trial granted.

[KINGS GENERAL TERM, May 7, 1866. *Scrugham, Lott, J. F. Barnard and Gilbert, Justices.*]

JOHN J. FULTON, administrator, &c. vs. ISAAC FULTON and  
CATHARINE FULTON.

A legal title, or right of possession is indispensable to the maintenance of an action of trover. An equitable right, merely, without any muniment of legal title, or of a legal right of possession, is not sufficient.

To allow one not a party to a note to recover it, or the value of it, from the payee, would be an anomaly in law. The maker of a note, or any one liable upon it, might maintain such an action, upon proper proof. But to allow a recovery, in such an action, on the ground that the promise contained in the note was to the plaintiff, or to one under whom he claimed title to it, would be a violation of the maxim that written contracts cannot be contradicted by parol evidence. *Per* GILBERT, J.

If the evidence be such as to show that an intended gift of promissory notes made to secure the payment of the consideration of a conveyance of real estate, did not take effect, or was revoked, the remedy of the donor's administrator is by a bill in equity, to recover the consideration of the notes from the makers, or to avoid the sale out of which they arose, and to get back the property sold.

By the common law, personal property may pass by gift or grant, with or without deed; but a parol gift, without some act of delivery, will not alter the property, whether by act *inter vivos* or *mortis causa*. But where a gift *inter vivos* is perfected by delivery of possession of the thing, or *delivery of a deed of gift*, it is complete, although made without any consideration.

An agreement between F. and his two daughters, the defendants, made on the 15th of November, 1851, contemporaneously with the sale to them of his farm and personal property, recited the consideration of such sale, which consisted in part of their five several promissory notes, each for the sum of \$500, payable to the three sons and two daughters of F. at the decease of his wife. The agreement referred to those notes as being the portions that F. wished the payees to receive out of his property after the decease of himself and his wife. In December, 1857, these notes were canceled, and F. caused the makers to execute new notes in renewal, and signed a paper declaring that he intended the new notes should be considered by his children "in full of their shares in his property which he had or ever had had."

*Held* that this transaction was not fraudulent as to creditors; that no trust was created for the use of the grantor; and that it was a fair and just distribution of his estate among his children.

*Held, also*, that it transferred the legal title to the debts represented in the notes; and, with the accompanying declaration contained in the agreement, and the paper of December, 1857, furnished satisfactory evidence that there was a delivery of the notes to the payees, and that the possession of them afterwards by F. was as trustee for them.

48	581
70h	477
48	581
74h	80
48b	581
15ap	101
48b	581
47ap	475
47ap	478
48b	581
50ad	142
48b	581
51ad	123
51	124

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*Held, further*, that the fact that the notes were left by the donor in a position where the beneficiaries might take them after his death was convincing proof that he did not change his mind; and no further formality, to complete the gift, was necessary.

It is only when something remains to be done, by or on behalf of the donor, which is not done before his death, that a gift fails to take effect.

An actual transmutation of possession is not essential, when the settler intends to convert himself into a trustee, and makes a sufficient declaration to that effect.

**A**PPEAL from an order made at a special term, held by Justice BARNARD, setting aside a nonsuit granted at the circuit court, held by Justice BROWN, and granting a new trial to the plaintiff. The action was brought by the plaintiff, as administrator, &c. of John Fulton, jun. deceased. The complaint alleged "the death of John Fulton, jun. in January, 1858, and that he had in his possession at his death three certain promissory notes, dated December 10, 1857," each of the value of \$500, of which one was in the following words :

"Seven years after the decease of John Fulton and Mary his wife, of the town of Milan, we promise to pay Mary Smith or order, five hundred dollars, value received, without interest, until that time. Dated the 10th day of December, 1857.

CATHARINE FULTON,  
ELIZABETH FULTON."

That the other two notes were of like form, except that one was payable to Alethea Coopernail, and the other to George Fulton. That said defendants, soon after the death of the said John Fulton, jun. wrongfully took said notes and sold, assigned, or gave them away, by which wrongful acts they had become lost to the plaintiff, and he had been unable to obtain said notes or convert them into money, and by the loss of said notes the debts of said John Fulton, jun. remain unpaid, no assets having come into the hands of the plaintiff as administrator. That on the 20th of August, 1858, the plaintiff was duly appointed administrator of all the goods, chattels and credits which were of the said John Fulton, jun. deceased, by the surrogate of Dutchess county, and was duly

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qualified to act as such administrator. The plaintiff, as such administrator, therefore demanded judgment against the defendants for \$1500 damages and costs.

The answer denied the averments of the complaint, and in addition thereto set forth quite circumstantially such matter as if true, showed that the plaintiff ought not to prosecute this his naked action at law, against the defendants. The plaintiff is a brother of the defendants; all the parties being children of John Fulton, jun. deceased.

On the trial, the plaintiff introduced in evidence letters of administration issued to him August 2, 1858, after the family meeting to which reference will be made. He introduced also a deed dated November 15, 1851, acknowledged on that day, and executed by John Fulton, jun. and Mary his wife, to Catharine Fulton, one of the defendants, and to Elizabeth Fulton, his sister, the grantees being the two unmarried daughters of the said John Fulton, jun. This deed was in consideration of natural love and affection and of \$2500, and conveyed a farm containing 100 acres two roods, the homestead, together with certain wood lots, and the grantees took back from Catharine and Elizabeth their covenant bearing even date with their deed, to provide for their parents, the grantors, a support during life and during the life of the survivor of them; to furnish them the sum of \$25 yearly for spending money; and to pay the debts of said John Fulton, jun. then existing and mentioned therein, and the agreement recited that Catharine and Elizabeth had signed notes of hand to their brothers and sisters payable after the decease of the said grantors. An additional agreement, or memorandum, signed by John Fulton, jun. and introduced by the plaintiff, and dated Dec. 26, 1857, showed a renewal of the original notes given November 15, 1851, giving the names of the brothers and sisters to whom Catharine and Elizabeth made their notes payable, and the amounts of them respectively, and showed no variation from the original transaction except only as to date, for which sole reason that memorandum was

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made and left. At a family meeting, March 27, 1858, the deed, agreements and notes were laid on the table, (all present except Mrs. Coopernail.) Isaac read the papers and notes, offered the notes to the respective payees, and said, "here are your notes." John, the plaintiff, and Philip refused to take their notes then, although on a subsequent demand made by John for them he received them. George and Mary Smith took theirs respectively, and as Mrs. Coopernail was not present, her note remained for that day, but on the following Sunday she called for it, and took it from Catharine. George was the only one who at the time of the trial had negotiated or parted with a note. He swore that he had sold his. The plaintiff placed his refusal to take his note, on the ground that he was not satisfied with the arrangement; he thought the girls, Catharine and Elizabeth, were getting too much, and not because of any rights of creditors, &c.

On these facts, substantially, the plaintiff rested his case at the circuit, and asked to recover of and from Isaac and Catharine the sum of \$301 and some cents, for each of the notes taken by George, Mary Smith and Alatheia Coopernail. At the close of the testimony, the defendants moved for a nonsuit, which motion was granted by the justice.

*J. W. Elseffer*, for the appellants. I. If the notes referred to were in the possession of John Fulton, jun. at the time of his death, they were notes which were given as a part of the consideration of a conveyance made Nov. 15, 1851, at a time when he was out of debt, or had provided for the payment of his debts, and could with entire propriety give the notes, or the avails of the conveyance, to whomsoever he chose. He elected then, as he had a right to do, to take that part of the consideration money for his farm, in notes payable to the persons therein named, at the time and for the amounts therein stated. He divested himself then, as he lawfully might, of the legal title and ownership of the notes, and by his own act and appointment, and that of the makers, pre-

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cluded himself from *any legal action* on the notes, or for the notes, as against the makers or any other person or persons. He held them from and after that date as attorney or agent for the respective payees thereof. If his possession of those five papers had been interfered with, by any person, the legal remedy against such person for the notes would necessarily have been not in his own name, but in the name of the payee and person for whose benefit the paper or note was held by him, and to whom it was payable. Those papers, *as notes*, possessed no value in law, except only to the respective payees thereof, or in the hands of such person or persons to whom the payees might indorse them.

II. If the creditors then existing of John Fulton, jun. had not been paid by Catharine and Elizabeth pursuant to their covenant, those creditors would have sought very poor redress by claiming the possession of pieces of paper called notes, payable to persons against whom they would have no process, and against whom they ask no judgment, to compel indorsement. Clearly creditors then existing, in 1851, would not and could not have pursued such an empty phantom as a naked action at law to recover the possession of those papers, or the value of them, which, when obtained, would be to them valueless. Such creditors at that time, had they been left unprovided for, could have proceeded by bill, by which all the parties to the pretended fraud would have been brought in, so that a competent judgment could have been obtained. If the executed contract and conveyance had been fraudulent as to them, they would not have proceeded for the notes, the fruits of the pretended fraud, but would have sought a remedy which would have reached the personal and real property of their debtor, John Fulton, jun.

III. The contract was executed in 1851, and must be viewed as an executed contract as of that time. Catharine and Elizabeth were grantees and purchasers for a valuable and adequate consideration, and whatever Catharine did, either by herself or through Isaac, is to be imputed to the spirit and

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requirements of a just contract then made, rather than to any tortuous or wrongful motive or act. The payment of the debts of their father then existing, the support and maintenance given by them to their father and mother for six years thereafter, and to their mother since that time, and now daily furnished to her, and the payment of the notes to the respective payees, or to their order, when due, were and are obligations which they assumed in 1851, and to the furtherance and fulfillment of them they were bound by solemn contract.

Clearly, before this plaintiff can recover the present or prospective value of those notes, he must have an adjudication against the payees or indorsers in court, as well as the makers, determining that he has a right superior to the payees, and such an adjudication as will protect the makers of the notes.

IV. In an action brought by the present plaintiff against Catharine and Elizabeth Fulton, this court has determined, and it stands *res adjudicata*, that this plaintiff, as trustee for the creditors of John Fulton, jun. subsequent to the conveyance of the property in 1851, had no rights or interest in the personal or real property, which he conveyed in 1851, or the avails thereof. The judgment and opinion of this court, in that case, entered in the year 1861, remains unmodified and unreversed. It was determined by that judgment, "that the transaction of 1851 was a just and fair settlement, and distribution of the estate of John Fulton, jun. amongst his children," and that the defendants are to be regarded as *bona fide* purchasers, is deemed conclusive here. It clearly follows that rights of others attached in some form, consequent on the execution of such a just and fair contract, and those rights, as to these notes in those other children, cannot be divested except they be brought before the court. The only debts which John Fulton, jun. created after 1851, were as surety for his son George. A bill in equity, clearly, is the only remedy, if any, which the plaintiff, as trustee for creditors, can take.

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He has mistaken his remedy, if he has any, by prosecuting this purely naked action at law.

V. Trover cannot be predicated on what was done in 1858 by Catherine, nor by Isaac in her presence; because, 1st. Whatever was done was in pursuance of a valid contract, and no rights had been adjudged then or since in favor of any other person. 2d. Because there was no conversion of the notes as such to the use of Isaac and Catherine, or either of them. 3d. Because, so far as the makers could make a delivery to the payees, they made it in 1851, and not after the death of John Fulton, Jr. 4th. Because the notes were not the property of John Fulton, Jr. at the time of his death. 5th. As this action is not for the property (which has been already passed on by this court) it cannot be imputed that Catherine and Elizabeth were fraudulent donees of the ancestor's property in possession after his death and therefore liable as executors *de son tort*: whatever might have been said in the other action involving the title of the personal property, as to their possession thereof as fraudulent donees, would clearly not apply to notes given by them in payment for the property, notes payable to persons other than John Fulton, Jr. 6th. The plaintiff seeks to affirm and hold good as against the makers, these notes; and clearly if they had paid and taken up the notes from the payees, prior to any injunction from the court, it could merely have been said that they did an act to secure and confirm them in the possession of the personal and real property to which they took title in 1851, by discharging the purchase money therefor, or a part thereof. 7th. Catherine and Elizabeth were bona fide purchasers, so adjudged, of the property, and not fraudulent donees thereof. The property, personal and real, they converted to their use as they of right did in 1851; the notes were taken and converted to use by the two brothers and three sisters. 8th. Since the judgment in the former case, the plaintiff as trustee for creditors has been barred and estopped, on principle and in law as to this purely naked legal action.

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He is without remedy at law as to Catherine and Elizabeth, and clearly also as to Isaac, in this action.

*H. L. Martin*, for the respondent. I. No interest or title to the notes vested in the payees therein named during the lifetime of said John Fulton, Jr. as they remained in his possession and under his control until his death. There being no delivery, the gift was void. (3 *N. Y. Rep.* 93. 2 *Barb.* 94. 10 *id.* 315.) It was void as to creditors. (14 *id.* 243.) The notes were not to be delivered until after Fulton's death. There being no consideration, the payees, being strangers to the transaction, could get no title except by will duly executed, &c.

II. These not being the property of said John Fulton, Jr. at the time of his death, passed to the administrator as assets. (2 *R. S.* 269, § 6.) All personal property of a person dying intestate passes to the administrators, except what is set off to widows and infants.

III. The defendants having taken these notes into their possession, and assumed control over them and given them away, are liable for their value. The administrator is not compelled to follow them into the hands of the payees and others that may get possession of them. The defendants having converted them, are liable for all loss and damage sustained by the estate. (2 *R. S.* 241, § 17. *Id.* 267, § 78, 4th ed.) An administrator now stands as trustee for the creditors, and can bring an action for their benefit. (12 *Wend.* 543. 2 *Hill*, 181, 226. 1 *Sandf. Ch.* 26. 3 *Barb. Ch.* 477.) All who request, direct and advise an act to be done which is wrongful, are themselves wrongdoers, and responsible for all damages. (2 *Comst.* 517. 5 *Denio*, 92.) Any unlawful interference with the property of another, or exercise of dominion over it, is a trespass. (10 *Wend.* 349, 350. 12 *John.* 484. 9 *Wend.* 167.) Assuming a right to dispose of property is a conversion. (7 *John.* 254. 10 *id.* 172. 5 *Cowen*, 323. 23 *Wend.* 462.) An abuse of possession, or breach of

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trust, is a conversion. (10 *John*. 172.) No demand was necessary. (3 *Wend*. 406. 10 *id*. 389. 23 *id*. 462.)

*By the Court*, GILBERT, J. 1. The validity of the transaction which gave rise to the notes in controversy, was affirmed by this court in the case of this plaintiff against the makers of the notes. It was sought in that case to impeach the sale in part consideration of which the notes were given, on the ground that it was fraudulent as to the creditors of the intestate. The court, however, held otherwise, and we must be governed by that decision.

2. Irrespective of the question whether there was a valid and effectual gift of the money which the makers of the notes thereby promised to pay to the payees thereof, (which we will presently consider,) we are of the opinion that this action cannot be sustained. A legal title, or right of possession, is indispensable to the maintenance of an action of trover. An equitable right, merely, without any muniment of legal title, or of a legal right of possession, is not sufficient. (*Herring v. Tilghman*, 13 *Ired*. 392. *Billion v. Carroll*, *id*. 431.) To allow one not a party to a note to recover it, or the value of it, from the payee, would be an anomaly in law. The maker of the note, or any one liable upon it, might maintain such an action, on proper proof. But to allow a recovery in such an action on the ground that the promise contained in the note was to the plaintiff, or to one under whom he claimed title to it, and not to the payee, would be a violation of the maxim that written contracts cannot be contradicted by parol evidence. The notes had no value, as property, to the intestate. They are only evidences of debt; and in a court of law are enforceable only in behalf of the payee. If, as is contended by the plaintiff, the evidence be such as to show that the intended gift did not take effect, or was revoked, the remedy of the administrator would be by a bill in equity, to recover the consideration of the notes from the makers, or to avoid the sale out of which they arose, and to get back the

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property sold. In such a suit, the makers and payees would be necessary parties, and a decree could be made, which would do justice to all concerned.

3. We think there was a valid and effectual gift of the money payable on the notes. By the common law, personal property may pass by gift or grant, with or without deed, (*Com. Dig. Biens. D, 2 ;*) but a parol gift, without some act of delivery, will not alter the property, whether by act *inter vivos*, or *mortis causa*. But where a gift *inter vivos* is perfected by delivery of possession of the thing, or *delivery of a deed of gift*, it is complete, although made without any consideration. The statute avoids voluntary grants and gifts in fraud of creditors. But, as before stated, we are concluded by the decision in the former case from considering the effect of this transaction upon the creditors of the intestate. For it was then held that it was not fraudulent as to creditors ; that no trust was created for the use of the grantor ; and that it was a fair and just distribution of the estate of the intestate among his children. The decision in that case must be deemed *res adjudicata* as to this question of fraud. The agreement between the intestate and his daughters, made contemporaneously with the sale to them of his farm and personal property, recites the consideration of such sale, and refers to the notes aforesaid as being the portions that the said John Fulton (the intestate) wishes them (the payees) to receive out of his property ; after the decease of himself and his wife. These notes were afterwards canceled, and new notes taken, in reference to which the intestate signed a paper describing them, and declaring that he intended they should be considered by his children "in full of their share in his property, real and personal, which he had or ever had had." The intestate caused the notes to be made payable to his children, who are named therein as payees, respectively. This transferred the legal title to the debts represented in the notes ; and with the accompanying declaration contained in the agreement and paper aforesaid, furnishes satisfactory evidence

that there was a delivery of them to the payees, and that the possession of them afterwards by the intestate was as trustee for them. An actual transmutation of possession is not essential, where the settlor intends to convert himself into a trustee, and makes a sufficient declaration to that effect. (*Lewin on Trusts*, 82.) Thus in *Ex parte Pye*, (18 *Vesey*, 149,) an agent was directed to purchase an annuity for a lady, but purchased it in the name of the testator, who afterwards authorized the agent to transfer the annuity into the name of the lady. Before the transfer was made the testator died. Lord Eldon held that the testator had committed to writing a sufficient declaration that he held that part of his estate in trust for the annuitant. The same principle is asserted in *Wheatley v. Purr*, (1 *Keen*, 551;) *Meek v. Kettlewell*, (1 *Hare*, 470;) *McFadden v. Jenkins*, (1 *id.* 458;) *James v. Bydden*, (4 *Beav.* 600;) *Thorp v. Owen*, (5 *id.* 224;) *Grangiac v. Arden*, (10 *John.* 293;) see also *Bunn v. Winthrop*, (1 *John. Ch.* 329;) *Souverbey v. Arden*, (*Id.* 240;) *Scott v. Simes*, (10 *Bosw.* 314;) *Van Deusen v. Bowley*, 4 *Seld.* 360; *Scrugham v. Wood*, (15 *Wend.* 545.)

But independently of this, there was, in contemplation of law, a delivery of the subject of the gift. That was the money payable upon the notes. "Delivery," says Chancellor Kent, (2 *Kent's Com.* 439,)-"in this, as in every other case, must be according to the nature of the thing. It may be constructive. It must be an actual delivery, so far as the subject is capable of delivery. It must be *secundum subjectam materiam*, and be the true and effectual way of obtaining the command and dominion of the subject." That the intestate intended to make this gift to, or settlement upon, his children is unquestionable. There is no evidence that he changed his mind. The fact that the notes were left by him in a position where the beneficiaries might take them after his death, is convincing proof that he did not. No further formality to complete the gift was necessary. It is only when something remains to be done by or in behalf of the

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donor, which is not done before his death, that the gift fails to take effect. The principle is well illustrated in *Harris v. Clark*, (3 Comst. 93,) although that was a case of an ineffectual gift, *mortis causa*. In that case, the gift was in the form of a draft of the donor on his bankers, and delivered to the donee, but the donor died before the presentment of the draft, and it was not accepted. The court held that the subject of the gift was *the money ordered to be paid by the draft*, and that it was ineffectual, *because, until accepted, the draft gave the donor no remedy to recover the money*. Judge Rugles, who delivered the opinion of the court, says: "There was no revocation of the gift by the donor, and it became absolute at his death if there was a sufficient delivery of the thing given during his life; and this depends on the question whether the draft, without acceptance, gave to the donee a remedy against the drawees, either in law or equity, to recover the money." So in *Irons v. Smallpiece*, (2 B. & Ald. 552,) Ch. J. Abbott says: "To transfer property by gift, there must be either a deed or instrument of gift, or an actual delivery of the thing to the donee." The act of delivering a note or other obligation of a third person to a donee as a gift, only furnishes evidence that it was intended by the donor as a gift of the money payable thereupon. The evidence of such intention may as well be afforded, as in this case, by a plain and unrevoked declaration of the donor, and the taking the note in the name of the donees, as by such delivery. If he retained the possession of the notes during his life, it will be intended that he did so for the benefit of the payees. Whether he did keep the notes, or whether he placed them in the hands of another, does not appear. In either case, there was a valid gift of the money payable on them. For, as was observed by Lord Justice Knight Bruce, in *Kekewich v. Manning*, (1 DeGex M. & G. 187,) "it is upon legal and equitable principle clear, that a person *sui juris* acting freely, fairly, and with sufficient knowledge, ought to have, and has it in his power, to make, in a binding and effectual manner,

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a voluntary gift of any part of his property, *whether capable or incapable of manual delivery, whether in possession or reversionary, or howsoever circumstanced.*"

The order granting a new trial must be reversed, with costs.

[KINGS GENERAL TERM, May 7, 1866. *Scrugham, Lott, J. F. Barnard and Gilbert, Justices.*]

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 KNOWLTON vs. FITCH and POOR.
 

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On the 5th of October, 1864, the plaintiff gave to the defendants, who were stock brokers, a written order to sell for his account one hundred Michigan Southern, at sixty-one three eighths. The plaintiff had no stock in the hands of the defendants, nor did he ever supply them with any, to enable them to execute the proposed sale. Both parties contemplated a speculative transaction, called a "short sale." The defendants did not make such a sale, but sold the stock, and, the next day, delivered the stock sold, which they had borrowed from another customer. On the 15th of November, 1864, the defendants bought one hundred shares, Michigan Southern, for the account of the plaintiff, at seventy-three, without any specific orders to do so. *Held* that the plaintiff was not liable for the difference in the price of the stock as shown by the sale on the 5th of October, and the purchase on the 15th of November.

**A** PPEAL from a judgment ordered at the circuit, on a trial before the court, without a jury.

The action was brought to recover a balance in the hands of the defendants as stock brokers, left by the plaintiff as a margin for stock speculations, with interest. The balance claimed was \$1249.19, alleged to have been in the hands of the defendants, on the 11th day of November, 1864. There was a balance of \$1249.19 standing to the plaintiff's credit on the 11th day of November, 1864, on transactions prior to October 5th, 1864; and there was also a credit of \$6137.20, cash, received for a short sale of 100 shares of Michigan Southern railroad stock, made on the written order of the

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plaintiff on said 5th of October, which sale was still outstanding. On the 5th of November, the market price of Michigan Southern having so risen as to absorb the plaintiff's entire margin, the defendants notified him of the fact, and required him to furnish more margin, or they would take in the stock "at such time as they should deem best for their own safety." The plaintiff did not furnish more margin, as required, and the defendants, after waiting for it until November 15, bought in the 100 shares for account of the plaintiff at 73, which reduced the plaintiff's margin from \$1249.19 to \$76.85. The justice before whom the action was tried, found in favor of the plaintiff for \$1249.19, the sum claimed, with costs, and judgment being entered on such finding, the defendants appealed.

*John Sessions*, for the appellants.

*L. A. Fuller*, for the respondent.

*By the Court*, GILBERT, J. We do not deem it necessary to discuss the technical points. Upon the merits, the case is this: On the 5th October, 1864, the plaintiff gave to the defendants, who are stock brokers, a written order to sell for his account 100 Michigan Southern at 61 3-8. The plaintiff had no stock in the hands of the defendants, nor did he ever supply them with any, to enable them to execute the proposed sale. He evidently contemplated a speculative transaction, called, in common parlance, a "short sale," and the defendants so regarded the order. One of them testified, on the trial, that "all these transactions for the plaintiff were short sales;" and the same witness defines a short sale to be "a sale before purchase, with a view of buying in when the market falls, at a lower price than we have sold." The defendants, in this instance, did not make such a sale, but sold this stock, and the next day delivered the stock which they sold. It appears that they borrowed the stock, which they delivered, from another customer. They gave the plaintiff no notice

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that they had sold or delivered the stock. The only evidence, on this point, is that of one of the defendants, who says: "From the time of the sale, on the 5th October, to the time I sent the letter, dated November 5th, to the plaintiff, his son was in the office almost daily *to inquire* about the transaction of the short *sale* of the 100 shares of Michigan Southern." What they told the son is not disclosed. On the 15th November, 1864, the defendants bought 100 shares Michigan Southern for the account of the plaintiff, at 73. No order was given by the plaintiff for this purchase. But the other defendant testified that the defendants had general instructions from the plaintiff to act for him on their judgment and discretion, and that his orders were generally made after the transaction.

It appears also that during the month of the purchase the parties frequently talked about it; that the plaintiff made no complaint; and that on one occasion he expressed regret that he had made the loss, but finally repudiated the transaction. The question, then, is, whether the plaintiff is liable for the difference in the price of this stock, as shown by the sale on the 5th October, and the purchase on the 5th November. We are of opinion that he is not.

I. If the sale on the 5th November was made for the account of the plaintiff, it was executed. The stock was delivered. The defendants received the price thereof. Nothing remained to be done by them, as agents, for the plaintiff. The purchase on November 15th, therefore, was unauthorized, and unnecessary, there being no pretense of any other sale, short or otherwise, for the plaintiff.

II. If the defendants borrowed the stock for the plaintiff, and the purchase was made to replace such stock, they had no authority to do so.

III. If the plaintiff authorized the defendants to sell their own stock, and buy it in again whenever they pleased, and agreed to pay any loss which might accrue, the transaction was void, (1 R. S. 662, § 1.) The act of April 10, 1858, does not embrace such a contract.

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IV. If the authority actually given to the defendants was to make an executory contract for the sale of stock deliverable at a future day, the defendants made no such contract.

Contracts of the latter description, being legal, it is the duty of courts to protect agents who in good faith make them for their principals. But the authority must be given, and the agency must be actually assumed. It will not do to set up an agency after a loss has happened, upon a vague and indefinite transaction like that presented by this case. The evidence is insufficient to establish a ratification by the plaintiff of the purchase in question. (*Brass v. Worth*, 40 Barb. 654.)

The judgment therefore must be affirmed, with costs.

[ORANGE GENERAL TERM, September 17, 1866. *Scrugham; Lott, J. F. Barnard and Gilbert*, Justices.]

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KETCHAM vs. HILLER.

Under a contract to deliver petroleum oil, within a specified time, not to the purchaser personally, or at his place of business, but "*to lighter*," a tender on the evening of the last day, is sufficient. It will be inferred that the parties intended, when they entered into the contract, that the buyer should send a lighter to receive the oil; and if he neglects to furnish, or wilfully withholds, the means requisite to enable the seller to deliver the oil within the contract time, he is in default.

Under such circumstances, the tender need not be made early enough within the contract time to enable the buyer to examine and accept the oil prior to the expiration of the time specified in the contract.

THIS is an appeal from the judgment of the city court of Brooklyn, and from an order of the same court at special term, denying a motion for a new trial, made on the judge's minutes.

The action was brought to recover damages for the alleged refusal of the defendant to receive five hundred barrels of petroleum oil under a contract entered into at the city of New

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York, through a broker, by bought and sold notes, one of which was as follows :

“NEW YORK, Sept. 22d, 1863.

Purchased for account of Messrs. Hiller & Co. from Mr. D. O. Ketcham, five hundred (500) bbls. of refined petroleum, color, light straw to white, fire test, 115 deg. and upwards, of standard gravity. In bond, in good shipping order to lighter at (65c) sixty-five cents per gallon, deliverable from 20th of October to the 30th of November, at buyer's option, with ten days notice to seller, buyer to furnish the necessary evidence of export to release manufacturers' bond, or pay U. S. tax thereon.

JOHN GRAVES, Broker.

Terms cash. Brokerage, 1 pr. c.”

(Endorsed) “Accepted, Hiller & Co.”

The other was in the same words, except that it was headed, “Sold for account of Messrs. D. O. Ketcham & Co.”

At the time of the contract the defendant's place of business was at No. 3 Chambers street, New York, and the plaintiff had an office at No. 134 Maiden Lane, New York.

The defendant did nothing under the contract, before it fell due, except that before that period there were some ineffectual negotiations for a compromise of it, and the plaintiff states in his complaint that he duly tendered the oil on the 30th of November, and at divers other times between the 20th of October and the 30th of November to the defendant at the city of New York, in accordance with the terms of the contract.

The defendant by his answer admitted that he executed the contract in the complaint set forth, as therein alleged, but denied every other allegation in the complaint contained ; and as a further defense alleged that he was ready and willing to perform his contract, but that the plaintiff failed to perform the same on his part.

The actual evidence on the trial was, that on the day when the contract expired, November 30th, at about six o'clock in the evening of that day, (which hour was after sunset,) when the gas-lights had been lit, the plaintiff made a tender of the

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oil, which was then lying at the Penny Bridge, Brooklyn, to the defendant, at his office in the city of New York, by offering him a bill of the oil, a gauger's return of the quantity, and a certificate of its inspection, and at the same time saying the oil was ready for delivery at the Penny Bridge, Brooklyn. Up to this time the plaintiff had never before notified the defendant where the oil was, nor given him an order for its inspection, nor asked him where he wanted the oil delivered. The defendant refused to accept the tender of November 30th, on the ground that it was not made in time. It was an undisputed fact in the case, that at the time the alleged tender was made, it was too late in the day to give the defendant a reasonable time to examine the oil and its packages, and accept it, prior to the termination of the contract time. The defendant's counsel requested the court to charge the jury, that the tender of the oil on the 30th of November was not a good tender, unless made early enough within the contract time to have given the defendant a reasonable time to examine and accept the oil prior to the termination of the contract time. This the court refused to charge, and charged the jury that, as matter of law, the tender of the 30th of November was a good tender, and in substance directed the jury to find for the plaintiff, if they found that the packages containing the oil tendered on November 30th were in good shipping order, and to this the defendant's counsel excepted. The jury found a verdict in favor of the plaintiff, and assessed the damages at \$4189.13. Judgment was ordered for the plaintiff for that amount with costs, and \$100 additional allowance. It was also ordered, that the defendant have twenty days time to make and serve a case herein, and that the plaintiff's proceedings be stayed in the meantime. The defendant's counsel moved upon the minutes for a new trial. Motion denied.

*M. V. B. Wilcoxson*, for the appellant. I. In an executory contract like the one in question, neither party could

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bringing an action against the other for non-performance, without showing performance, or an offer or tender of performance, on his part. (*Dunham & Dimon v. Pettie & Mann*, 8 N. Y. Rep. 508. See also *Lester v. Jewett*, 11 id. 453; *Beecher v. Conradt*, 13 id. 108.)

II. The only tender or offer of performance proven in this case, before and up to the time the contract matured, was at the office of the defendant in the city of New York, on November 30th. And the city of New York, the plaintiff swears, was the place where, under the contract, the offer or tender was to be made.

III. As the contract fixed the time of performance, the offer could only be made within the time fixed by the contract. (*Dixon v. Clark*, 5 Com. Bench R. 365, 378.)

IV. The right to make the offer within that time could only be exercised reasonably, as to the time and circumstances of its exercise, and with a reasonable regard to the convenience and rights of the party to whom the offer was to be made. It could therefore only be made within reasonable hours of the day, within the contract time, and early enough in the day for the defendant to have inspected the quality of the oil, and the condition of the casks in which it is contained, within the contract time, before accepting it. (*Startup v. McDonald*, 2 Scott's R. (N. S.) 485. S. C. in error, 7 id. 269. *Chit. on Cont.* 467, 10th Am. ed. 2 *Story on Cont.* 315, § 809, 4th ed. *Addison on Cont.* 1132, 2d Am. ed. 1 *Parsons on Cont.* 532, 5th ed. See also *Isherwood v. Whitmore*, 11 Mees. & Welsb. 350; *Reed v. Randall*, 29 N. Y. Rep. 358.) The facts proven in this case, of a custom on contracts like the one in question, of giving two or three days' preliminary notice that the oil is ready, and sending an order for its inspection, shows conclusively that the tender here was not only inconsistent with law, but with custom also.

V. If these propositions are correct, it is evident that the defendant was entitled to have had submitted to the jury the question of fact, whether the plaintiff was ready and

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offered to perform on his part, according to the contract ; and that the court below erred in charging, as it did, as matter of law, that the tender in the evening of the 30th of November was a good tender, and that the defendant is entitled to a new trial for this error. See a somewhat similar case, (*Dunham v. Pettee*, 8 N. Y. Rep. 514,) where a new trial was granted.

VI. By this action of the court, other questions, which might have been possibly involved in the case and raised, were withdrawn from the consideration of the court and jury below. For example : (a.) Whether the defendant, by any act of his prior to or on November 30, *before breach* of the contract, waived tender, or induced the plaintiff to delay his offer to deliver or delivery of the goods until after the appointed time. In that case it may well be that the law would not allow any objection to the tender inconsistent with good faith. (b.) Whether the defendant, *after breach* of the contract, by a new agreement, upon a sufficient consideration, extended the time of performance. (See *Kellogg v. Olmsted*, 25 N. Y. Rep. 189 ; *Delacroix v. Bulkley*, 13 Wend. 75.) But in that case, the old agreement being by the statute of frauds required to be in writing, the new one extending the time of performance would also have had to be in writing. (See *Blood v. Goodrich*, 9 Wend. 73, 79 ; *McKnight v. Dunlop*, 5 N. Y. Rep. 537, 546 ; *Wright v. Weeks*, 25 id. 157 ; *Marshall v. Lynn*, 6 Meeson & Welsby, 117 ; *Giraud v. Richmond*, 2 Common Bench R. 844.) (c.) But neither of these questions of fact, by the action of the court, were submitted to the jury, or considered by the court ; and the plaintiff must stand or fall on the tender of November 30, which the court below declared to the jury was sufficient.

VII. If the points already stated entitle us to a new trial, it will be unnecessary to go through the evidence, a careful scrutiny of which, it is submitted, will show that the whole of the packages of this oil were not in good shipping order,

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particularly for exportation, for which purpose the contract indicates the purchase was intended.

*G. T. Jenks*, for the respondent. I. The contract expired on the 30th of November, and tender on that day was good. By its terms the seller was entitled to ten days' notice to deliver, and there is no pretense any notice was given the seller. There was, therefore, no necessity for tender. The defendant could not be put in default until the 30th. The defendant made no objection that the tender was too late. At all events, any defect in the tender was expressly waived, and the defendant himself so testifies, and the only question left in the case was, whether the oil was "according to agreement" i. e. shipping order, &c.

II. The question whether the oil was in good shipping order was a question of fact for the jury, and they have determined it.

III. The question of reasonable tender was one of law, on the facts, for the jury to determine. The exception, therefore, upon that point was not well taken. It was substituting the opinion of the witness for the decision of the judge and jury.

*By the Court*, GILBERT, J. The question in this cause is, whether a breach of the contract by the defendant was proved. The contract was made on the 22d of September, 1863, in which it is stated that the defendant had purchased of the plaintiff 500 barrels of refined petroleum, &c. &c. in bond, in good shipping order, *to lighter*, deliverable from the 20th of October to the 30th of November, at buyer's option, with ten days notice to seller, buyer to furnish the necessary evidence of export, or pay the United States tax thereon. The defendant did nothing under the contract before the 30th November, 1863, and on that day the plaintiff, between five and six o'clock in the evening, handed to the defendant a bill of the oil, a gauger's return of the quantity, and a certificate

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of the inspection of it, and told him the oil was ready for delivery at his yard. The defendant then made no reply, but on the third day afterwards repudiated the contract, on the ground of the insufficiency in point of time of the aforesaid tender of the plaintiff. The jury found that the plaintiff had the oil, and that it was of the prescribed quality, and in good shipping order.

Upon the trial, the defendant claimed that the oil should have been tendered a sufficient time before the expiration of the contract, to enable him to inspect it. The court held that the tender was good, and that it need not have been made early enough within the contract time to have given the defendant a reasonable time to examine and accept the oil prior to the expiration of the contract time. The defendant excepted to this finding, and upon this exception the question arises, which is decisive of the case. We are of the opinion, that no error was committed by the court below. The oil was to be delivered, not to the defendant personally, or at his place of business, but "*to lighter.*" The evidence shows that the plaintiff was a refiner of the oil; that he had a manufactory for that purpose, connected with the wharf in that part of New York; and that the oil was purchased for exportation. It is fair to infer, therefore, that the parties intended, when they entered into the contract, that the defendant should send a lighter to receive the oil, and by the terms of the contract, he was "to furnish the evidence of export, to release the plaintiff's bond to the government." It was the duty of the defendant to prepare these preliminary acts, receive the oil, and pay for it. And he was bound to be ready to receive the oil a sufficient time before the expiration of the contract time to enable the plaintiff to deliver it within the contract time. The defendant was clearly in default, and the offer to deliver made by the plaintiff was sufficient. He could do no more. He could not deliver the oil pursuant to the contract, because the defendant had neglected to furnish, or willfully withheld, the means requisite to enable him to do so. The defendant

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certainly cannot be permitted to annul his obligation under the contract, by thus withholding the means of a performance of it by the plaintiff. (*Crooke v. Moore*, 1 *Sandf.* 302. *West v. Newton*, 1 *Duer*, 283.) The case of *Hartup v. McDonald*, (2 *Man. and Gr.* 593,) on which the defendant relies, we think, has no application to the facts, and does not affect the principle of this case.

The judgment should be affirmed.

[ORANGE GENERAL TERM, September 17, 1866. *Scrugham, Lott, J. F. Barnard* and *Gilbert*, Justices.]

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THE PEOPLE, *ex rel.* Elkanah F. Remington, *vs.* THE RECTOR, CHURCH WARDENS AND VESTRYMEN OF THE CHURCH OF THE ATONEMENT.

The section of the statute relative to religious corporations, which provides that no board of trustees shall be competent to transact any business "unless the rector, if there be one, and at least one of the church wardens, and a majority of the vestrymen, be present; and such rector, if there be one, and if not, then the church warden present, or if both the church wardens be present, then the church warden who shall be called to the chair \* \* \* shall preside at every such meeting or board, and have the casting vote," (1 *R. S.* 4th ed. 1179, § 1; 2 *id.* 5th ed. 604,) does not mean that the chairman shall have the casting vote only in case of a tie arising upon the votes of the other members.

The term "casting vote," as used in that section, is to be construed as authorizing the chairman, after having first voted with the rest, upon a tie occurring, to give a second vote.

Where, at a meeting of a vestry, both wardens and eight vestrymen being present, and the senior warden in the chair, five voted in favor of engaging the relator as rector, and five, including the presiding officer, in the negative, whereupon the chairman declared the resolution to be lost; *Held* that the chairman must be deemed to have given the casting vote; his declaration that the vote was lost, being equivalent to that; that upon the vote taken, the resolution to call the relator failed for lack of a majority of the votes; and if the chairman voted twice, it was *lost*, by reason of a majority voting against it.

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**H**EARING upon the return to an alternative writ of mandamus, after a trial of the issues of fact raised by the return. The relator asked for a writ of mandamus against Arthur Sinclair, Edward Buckley, John E. Wright, Isaac A. Biggs and James Gough, to compel them to induct him into the office of rector of the Church of the Atonement.

*Isaac Jelfs*, for the relator.

*Justus Palmer*, for the defendants.

*By the Court*, GILBERT, J. Upon the trial of the issues formed upon the return to the alternative writ of mandamus, these facts appeared : On the 28th November, 1866, a regular meeting of the vestry was held, both wardens and eight vestrymen being present. There being no rector, the senior warden was duly called to the chair. A resolution was offered to the effect that the relator be engaged as rector for one year from December 1, 1866. Upon this, five voted in the affirmative, and five, including the presiding officer, in the negative, whereupon the presiding officer declared the resolution to be lost. The relator has not been otherwise called, nor has he signified to the respondents his acceptance of the office of rector, unless this proceeding has that effect.

It is claimed by the relator, that he was legally chosen rector, because the senior warden, who presided at the meeting, had no right to vote at all thereat, except to give the casting vote, in case of an equality of votes, without counting his own.

The statute applicable to this case provides that "the church wardens and vestrymen elected at the first election," and their successors in office, of *themselves*, but if there be a rector, then, together with the rector, shall form a vestry and be the trustees of such church or congregation ; and *such trustees and their successors* shall, by virtue of the act, be a body corporate, &c. and the church wardens and vestry-

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men shall have power to call and induct a rector to such church or congregation as often as there shall be a vacancy therein. *Provided, however,* that no board of trustees shall be competent to transact any business, "unless the rector, if there be one, and at least one of the church wardens, and a majority of the vestrymen, be present; and such rector, if there be one, and if not, then the church warden present, or if both the church wardens be present, then the church warden who shall be called to the chair by a majority of voices shall preside at every such meeting or board, *and have the casting vote.*" (1 *R. S.* 4th ed. 1179, § 1. 2 *id.* 5th ed. 604.)

The question, then, is, what is the legal signification and effect of the phrase "*and have the casting vote.*" Does the calling a church warden to the chair, annul for the time being his right as a constituent member of the corporate body, or absolve him from the execution of any trust or duty devolved upon him as such member? No authority for such a proposition was cited, except the learned treatise of Mr. Curtis on *Parliamentary Practice*. This author does, indeed, in his commentary on the practice of legislative assemblies, in the absence of express regulations, sustain the position of the relator's counsel. But he shows at the same time that the reasons for such practice are peculiar to that kind of assembly. In the English house of commons, the speaker never votes but when there is an equality without his casting vote, which in that case creates a majority; but the speaker of the house of lords has no casting vote. His vote is counted with the rest of the house; and in case of an equality, the *non-contents*, or negative voices, have the same effect and operation as if in fact they were a majority. (1 *Bl. Com.* 181, n.)

The practice in the congress of the United States, and in the legislature of this state, is different. Neither the vice president of the United States, nor the lieutenant governor of this state, as presiding officer of the senate, has any vote,

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unless the votes be equally divided. The speaker of the house of representatives of the United States, and of the assembly of this state, each have a vote.

The rule of the common law applicable to corporations, however, is uniform and well settled ; and it is applicable to religious societies incorporated under our law. They do not belong to the class of ecclesiastical corporations, in the sense of the English law ; but are civil corporations, governed by the ordinary rules of the common law. (*Robertson v. Bullions*, 1 Kern. 243.) In corporations consisting of an indefinite number, a major part of those who are existing at the time are competent to do the act. But when the body is definite, (as it is in this case,) there must be a major part of the whole number, *for it is a special appointment*. (*Rex v. Varlo*, Cowp. 250. *Rex v. Bellinger*, Com. 293. This rule of the common law has been expressly declared by the statute. (2 R. S. 555, § 27. *Horton v. Garrison*, 23 Barb. 176.)

As a majority of the vestry did not vote in favor of calling the relator, he was not, therefore, called or elected, unless the statute giving the chairman a casting vote is to be construed as meaning a vote only in case of a tie arising upon the votes of the other members. The plain reading of the statute does not admit of such a construction. It first vests the power of election in a body of which the chairman is a constituent member. This is a grant to every such member of a right to vote. It then contains another grant of power *to the presiding officer, virtute officii*, in the words, "he shall have the casting vote." What is the legal effect of the latter grant ? By the common law, a casting vote sometimes signifies the single vote of a person who never votes ; but in the case of an equality, sometimes the double vote of a person who first votes with the rest, and then, upon an equality, creates a majority by giving a second vote. (1 Bl. Com. 181, n. *Jac. Law. Dic. Parliament*, 7.) I think that in the statute under consideration, the term "casting vote" is

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used in the latter sense. (1 *Bl. Com.* 478, n. *Cowp.* 377.) It is true that a double vote is not allowed in corporate meetings, except by express statute, (*Anon. Loft's Rep.* 315 ; 15 *Vin.* 214;) but that it ought to be allowed where the statute is clear, cannot be doubted. In *Rex v. Giniver*, (6 *T.R.* 732,) a charter had been granted creating a corporation, and giving *the bailiffs and aldermen*, or *a major part of them*, power to choose a senior bailiff. A by-law was passed, giving *to the senior bailiff the casting voice*, in cases where in the election of bailiffs, aldermen or other officers *the voices should happen to be equal*. The court held the by-law to be void, because it was contrary to the constitution of the charter ; but it was tacitly conceded that if the provision of the by-law had been incorporated in the charter, the senior bailiff would have had, in case of an equality of votes, a double vote. Lord Kenyon, Ch. J. and Lawrence J. expressly asserted that such would have been the effect of the by-law if it had been valid. (*See also Rex v. Bumpstead*, 2 *Stew.* 231. *State v. Adams*, 2 *B. & Ad.* 699.) It appears from the evidence that the chairman voted with his colleagues, and that the votes were equal. He must be deemed also to have given the casting vote. His declaration that the vote was lost, was equivalent to that ; and it would not be strictly correct unless it should be so regarded. But if the foregoing views are correct, it is immaterial whether he declared the resolution lost upon the fact that the votes were equal, or whether he gave a casting vote. Upon the vote actually taken, the resolution to call the relator failed, for lack of a majority of the votes of all the members of the vestry entitled to vote. If the chairman voted twice, it was *lost* by reason of a majority voting against it.

It follows, therefore, that the respondents are entitled to judgment, with costs.

THE PEOPLE, *ex rel.* The Phenix Fire Insurance Company,  
*vs.* THOMAS A. GARDINER, county treasurer, &c.

Certificates of indebtedness of the United States, issued pursuant to the acts of congress passed in 1862, are not "*securities*" within the act of congress of February 26, 1862, exempting from taxation all "stocks, bonds and *securities* of the United States."

They are merely certificates or acknowledgments of a pre-existing indebtedness, incurred in the ordinary way, without any security or any specific pledge of the public faith,

Congress, in exempting "*securities*" from taxation, has not excluded the states from the power to tax these certificates.

The act of the legislature of April 6, 1866, (*Laws of 1866, ch. 418,*) does not limit the authority of the county treasurer of Kings county, in issuing the certificates of indebtedness specified in section 8, to cases of taxes on investments which have been judicially decided to be exempt.

A MANDAMUS was issued to the county treasurer of Kings county, to compel him to give a certificate under the law of 1866, (*Laws of 1866, ch. 418, vol. 1, p. 919,*) for taxes paid in 1863 and 1864, on U. S. "certificates of indebtedness." There was a return of the county treasurer, alleging that the taxes on "*Certificates of Indebtedness*" mentioned in said writ of alternative mandamus, are not decided, and have not been judicially decided to have been illegally imposed or collected, nor has it been judicially decided that "*Certificates of Indebtedness*" of the United States of America are exempt from taxation, and that taxes thereon have been illegally imposed and collected. And therefore that the investments of the relator in "*Certificates of Indebtedness*" stated in said mandamus, are not within the purview of the act, (*ch. 418, of the Laws of 1866;*) and consequently he, the said county treasurer, had no authority in law to issue the certificates so, as aforesaid, refused to the relator.

To this return the relator demurred. Joinder in demurrer; and judgment for the respondent on demurrer, at special term. The relator appealed to the general term.

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*A. C. Bradley*, for the appellant.

*P. S. Crooke*, for the respondent. I. The act of congress, February 25, 1862, exempted from taxation "all stocks, bonds and other securities of the United States." (12 *Stat. at Large*, 346, § 2.)

The act of March 1, 1862, authorized the issue of "certificates of indebtedness" "in satisfaction of audited and settled demands." (12 *Stat. at Large* 352.)

III. The act of June 30, 1864, provided that "all bonds, treasury notes and other obligations of the United States shall be exempt from taxation by or under state or municipal authority." (*Laws of U. S.* 1864, p. 218.)

IV. "The certificates of indebtedness" are not included in the act of 1862, (passed previously.) They are not comprised under the description of "stocks, bonds, securities."

V. They are not decided judicially to be exempt from taxation. (2 *Wallace U. S. Rep.* 200.)

GILBERT, J. The relator is a corporation, doing business in the city of Brooklyn, and was assessed for the taxes of 1863 and 1864, upon its investments in the certificates of indebtedness, issued pursuant to the acts of congress, passed in 1862. (12 *Stat. at Large*, 352-370.) These taxes were paid into the county treasurer's office of Kings county. On the 6th of April, 1866, the legislature of this state passed an act entitled "An act to authorize the board of supervisors of the county of Kings to correct illegal assessments for town, county and state taxes," and thereby authorized and directed the supervisors of said county "to levy and collect by tax the several sums paid the county of Kings by the several incorporated companies in said county in 1863 and 1864, for taxes assessed on their investments in the public indebtedness of the United States, with interest thereon, and which taxes have been judicially decided to have been illegally imposed and collected." It then directed the county

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treasurer "to pay over and refund to the said corporations, the several amounts of taxes thus illegally imposed and collected as aforesaid," out of the moneys so to be raised, and in the meantime to issue certificates of indebtedness, payable on or before January the 1st, 1867. (*Laws of 1866, vol. 1, p. 919.*) The respondent having refused, after due demand, to issue to the relator the certificates for the sums paid by it as aforesaid, an alternative writ of mandamus was issued, commanding him so to do, or show cause, &c. The return to this writ sets forth that the taxes against the relator aforesaid are not, and have not been decided to have been illegally imposed or collected, nor has it been judicially decided that certificates of indebtedness of the United States are exempt from taxation; that taxes thereon have been illegally imposed and collected; and that the investments of the relator are not within the provisions of the act of April 6, 1866, and therefore the respondent has no authority to comply with the relator's demand.

To this return the relator demurred. It was contended on the part of the respondent, that the return presented a material issue of fact, namely: whether it has been judicially decided that the taxes in question were illegally imposed, &c. and that since the demurrer admitted the truth of the facts stated in the return, the respondent was entitled to judgment. This position of the respondent can be maintained only upon the assumption that the act of April 6, 1866, limits the authority of the respondent to the issuing of certificates for taxes on investments which have been judicially decided to be exempt. I am of opinion that no such limitation is contained in the act. The statute is a remedial one. Its object is shown by its title to have been redress for illegal taxation. If the legislature meant the refunding only of such taxes as had been "judicially decided" to have been illegally imposed, to the supervisors, and not to the respondent, was committed the duty of determining what taxes came within the act.

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The duty imposed on the respondent was ministerial merely, not judicial. The legal intendment is, that the supervisors performed their duty under the act, and there not being any averment to the contrary, it will also be intended that their action furnishes no defense to the respondent. The demurrer, therefore, was well taken.

It does not follow, however, that a peremptory mandamus must issue. For the question now arises whether the facts stated in the writ are sufficient. (*People v. Ransom*, 2 *Comst.* 490.) Upon this subject, the first question is, whether these certificates of indebtedness fall within the exemption contained in the act of congress of February 26th, 1862. That exemption extends to all "stocks, bonds and securities of the United States." Manifestly they are not "stocks" or "bonds." Are they securities, within the meaning of the act of congress? Upon reflection, and contrary to my first impression, I have come to the conclusion that they are not. They are authorized to be given only for two purposes, namely, "*in satisfaction of audited and settled demands,*" "*and in discharge of checks drawn by disbursing officers.*" They are, therefore, merely certificates or acknowledgments of a pre-existing indebtedness, incurred in the ordinary way, without any security or any specific pledge of the public faith. The object of granting the authority to issue them, was to accommodate persons who had outstanding accounts against the government, by giving them tangible and certain evidence that such accounts had been audited and settled, and of the amount due. The government derived no benefit from them, except relief from demands for present payment, and an augmentation of the ability to furnish it further aid, which these facilities to the public creditors afforded; nor was the issue of them necessary to the enjoyment and exercise of the powers vested in the government. I think, therefore, they are not securities in any higher degree than the audited accounts and checks which they represent. The object of the exemption under consideration has been generally under-

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stood to have been the facilitating the government in obtaining new and further credit upon loans of money and purchases of property. If this was the object and intent of the statute, we are precluded by long and familiar rules of construction, from extending the meaning of the word beyond what is necessary to promote and secure that object. (1 *Bl. Com.* 60. *U. S. Trust Co. v. Brady*, 20 *Barb.* 119. *Strong v. Wheaton*, 38 *id.* 616.)

It is also a significant fact that congress had granted no authority to issue these certificates when the act containing the exemption was passed. They could not, therefore, have been in contemplation of congress. Perhaps the best test of the meaning of the word "securities" in this connection is in the application of the maxim, "*Noscitur a Sociis.*" The statute exempts "stocks, bonds, and other securities of the United States." Stocks are the registered obligations representing a portion of the permanent funded debt of the government. Bonds are similar unregistered obligations, and upon the principle referred to, the securities must be deemed the other obligations, of a less formal character, but created for the same general purposes and having the same general uses. (*Broom's Leg. Max.* 450, *et seq.*)

The learned counsel for the relator insisted that these certificates, being a form of government debt, were not taxable under state authority, even though they are not exempt from such taxation by act of congress. No adjudication to this extent, however, was cited. In the cases of *McCulloch v. Maryland*, (4 *Wheat.* 316,) and *Osborn v. The Bank of the United States*, (9 *id.* 738,) the court decided no more than that the states could not tax the operations of the Bank of the United States, because that corporation was one of the means employed for carrying into execution powers vested in the general government. They ruled distinctly, in the first case, that property acquired by the bank in a state was liable to taxation. In *Weston v. Charleston*, (2 *Peters*, 449,) the court decided that state taxation on government stock was

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illegal because it was a tax on the contract, a tax on the power to borrow money on the credit of the United States. (*See 2 Black, 631, et seq.*) These cases ought, on grounds of public policy, to be restricted to the point decided.

The exemption of the stocks and bonds of the United States is already severely felt by the people in the unequal burdens which those who are not owners of such property sustain. A construction of the constitution which establishes a privileged class of public creditors, who, though living under the protection of the government are exempted from bearing their share of its burdens, ought to be very palpable before it is adopted.

The power of taxation under our government as a general rule is a concurrent one. The qualification of the rule as held by the Supreme Court of the United States in *Van Allen v. The Assessors*, (3 Wallace, 585,) are the exclusion of the states from the taxation of the means and instruments employed in the exercise of the functions of the federal government.

It was also held in this case, that when the concurrent power exists, although congress may, by reason of its paramount authority, exclude the states, yet there is no doubt congress may withhold the exercise of the authority, and leave the states free to act. If I am right in my construction of the act of congress exempting "securities" from taxation, they have not excluded the states from the power to tax these certificates.

Consequently the mandamus was properly denied, and the judgment should be affirmed.

J. F. BARNARD, J. was for affirmance, on the ground that the return presented a question of fact, and the demurrer admitted the truth of it.

LOTT, J. expressed no opinion.

Judgment affirmed.

[KINGS GENERAL TERM, February 11, 1867. Lott, J. F. Barnard and Gilbert, Justices.]

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## MYERS vs. SMITH.

A proposition, made by one party, by letter, to another party at a distance, containing a specific offer, which is unconditionally accepted by the latter, will constitute a valid contract between them.

A bargain thus evidenced is to be deemed closed when nothing mutual between the parties remains to be done to give either a right to have it carried into effect.

From the moment when the minds of the contracting parties meet, signified by overt act, the contract is obligatory. And whatever amounts to the manifestation of a formal determination to accept an offer of a contract of sale, communicated to the party making the offer, is an acceptance which will bind the bargain.

But where the letters of a person proposing to purchase indicate that an interval is meant to be provided for, during which the property is to be held by the owner until the former can examine it, and determine in what manner it shall be disposed of; and the conduct of the purchaser lends confirmation to that conclusion—as by his going to the vendor's place of business without funds to pay for the property, and without any arrangement to procure funds for that purpose, and without providing any means of taking away the property—this will not be deemed an executed and completed contract, mutual in its obligations, but merely a *negotiation* inchoate and unperfected.

An acceptance of an offer made by letter must be in the words of, or must be entirely accordant with, the terms and conditions of the offer, to bind the party who makes the proposition.

Thus, where an offer was to sell malt "delivered" on the boat at W., and the acceptance was of the malt "deliverable" on boat; *Held* that this was a manifest variance from the terms of the offer.

Though an offer and demand of performance may be necessary to atone for an apparent laches, and to put the other party in default, yet they assume the existence of a contract of which the party offering and demanding has a right to require the performance, and they have no effect where there is no existing and obligatory contract to which they may be referred, and to which they are a necessary supplement.

An alleged contract was evidenced by a letter, from the defendant to the plaintiff, dated June 18th, and the plaintiff's answer thereto, dated June 20th. The latter, when transmitted, was not stamped, but a copy in the plaintiff's letter book was stamped, and the plaintiff testified that he stamped the defendant's letter of the 18th, on the day after its receipt, and canceled both of the stamps. *Held* that in the absence of any pretense that the defendant ever stamped his letter, or proof that he ever saw the stamp after it was affixed, or assented to the stamping, or the cancellation, this was not such a stamping as the act of congress requires; and consequently the paper was void.

The person executing the document which requires a stamp is the one to affix it; and in any event it cannot be affixed, nor the cancellation be made, by

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another party, without the actual knowledge and express or implied assent of the party who issues the paper on which the stamp is placed.

*Held, also*, that the subsequent appearance of the plaintiff before the United States collector, excusing the omission and procuring him to stamp the letters and cancel the stamps, and to sign his certificate to that effect, did not remedy the difficulty in respect to the want of a stamp.

The person who is to appear before the collector and procure the stamping and cancellation is the person who issued the paper and who should have affixed the stamp. He it is upon whom the penalty of \$50 is imposed by section 158 of act of congress; and he can only be relieved by appearing and making the application and securing the indemnity.

If a party having an interest in a paper shall desire it to be thus stamped for his benefit, he can only effect it by procuring the maker or party to be affected by it to appear before the collector and procure the stamping and cancellation.

**T**HIS action was brought on a contract claimed to have been made by letter. The plaintiff was a brewer residing at Ilion, Herkimer county, and the defendant was a maltster, living at Clyde, Wayne county, and having a malt house at Weedsport. The parties lived about one hundred miles apart. On the 10th of June, 1864, the plaintiff addressed the following letter to the defendant :

“ ILION, June 10th, 1864.

MR. SMITH: Dear Sir—I understood by Mr. Howe, of New York, you were about to ship a boat load of malt; if you did not sell it at Albany you should take it to New York. I want to buy about ten thousand bushels of four rowed winter made malt, to run our brewery through the months of July and August. One cannot use two rowed malt for summer brewing. Now, what will you sell me ten thousand bushels of four rowed winter made, 54 pounds to the bushel, 2½ off for screenings or dust, cash down, per bushel for? Answer me by mail, or telegraph me, and if the offer will warrant, I will come up and see it. Respectfully yours,

J. MYERS.”

This letter was followed by an answer from Smith, the defendant, dated June 14, 1864, and by a second letter from the plaintiff, dated June 15th. On the 18th of June, the defend-

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ant wrote the following letter to the plaintiff, dated Clyde, June 18th ;

"J. MYERS, Esq. Ilion : Dear Sir—Yours of the 15th inst. came to hand, and I have refrained from answering till now, expecting to hear from parties I was negotiating with, before receiving your letter. The malt I have for sale is at Weedsport. I will sell you ten thousand bushels of the malt, 34 pounds to the bushel,  $2\frac{1}{2}$  per cent off for screenings, at (\$1. 54) one dollar and fifty-four cents per bushel, delivered on the boat at Weedsport. Answer by return mail, and direct the letter to Weedsport.

Respectfully yours,

THOMAS SMITH,  
per G. O. Smith."

[Five cents internal revenue stamp, cancelled by J. M. June 20th, 1864.]

This was received by the plaintiff Monday June 20th, who answered it within an hour after it was received, and mailed an answer at Ilion, addressed to the defendant at Weedsport. This letter was as follows :

"ILION, June 20th, 1864.

THOMAS SMITH : Dear Sir—Your letter under date of June 18th came to hand this Monday forenoon. I will take your malt, ten thousand bushels, deliverable on boat at Weedsport, at 154 cents for 34 pounds to the bushel, and  $2\frac{1}{2}$  off for dust or screenings. I will be up as soon as I can get away from home, which will be the last of this week, or the fore part of next week. Respectfully yours, J. MYERS."

[U. S. revenue stamp five cents, cancelled June 20 by J. M.]

The plaintiff telegraphed the defendant June 22d, and on the 23d he went to Weedsport ; on his arrival there he met defendant's son at the cars, who told him his father was at Clyde. The plaintiff went to Clyde, and saw the defendant there the same day. The plaintiff had the defendant's letter of June 18, and a copy of his own, of June 20, each with a five cent revenue stamp on, canceled. Both letters were read. The

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plaintiff told the defendant he had come up to make arrangements to receive the malt. The defendant replied, he thought he had not malt enough for him—he had been shipping a boat load the day before. The defendant said he did not get the plaintiff's letter of June 20th, from Weedsport, as soon as he ought; it was sent by private conveyance from Weedsport. The plaintiff replied, he was not to blame for that; he sent it as he was directed. Defendant's son (who it seems attended to the business at Weedsport) said the plaintiff was not to blame for that. The load spoken of that had been shipped, contained 14,000 bushels of malt, and was taken from Weedsport. The defendant told the plaintiff he did not know but he would let him have what was on the boat if it was not sold in Albany; and inquired where the plaintiff would take it. The plaintiff replied, if the defendant would let him have what was on the boat he would pay freight and charges, and take it at Ilion, Albany or New York, as was most convenient. The defendant said he would go to Albany and see what he could do, and if the contract there was not binding he would let the plaintiff have it. The parties went to Weedsport, to see how much malt was left, and found from five to six thousand bushels. The defendant told the plaintiff if the malt on the boat was sold, he would let him have to fill his contract the quantity at Weedsport, and make up the balance somewhere else. June 24th, the defendant, from Albany, telegraphed the plaintiff at Ilion, the malt on the boat was sold. The plaintiff then inquired when defendant would deliver the malt at Weedsport. About June 30th, the plaintiff received a telegram from defendant at Albany, stating, "I will see you on my return, Friday or Saturday. The defendant did not call on the plaintiff, or give him any further answer. July 12th, the plaintiff sent Mr. Lawrence to Clyde, to make arrangements to receive the malt and pay for it, and gave him a letter to the defendant, authorizing him to receive the malt. Lawrence obtained no malt. July 14th, the plaintiff went with the money to Clyde, and saw the defendant,

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and told him he came up to receive the malt, and pay for it. The defendant said he had got done with the plaintiff, and had no malt for him. The plaintiff then wrote the defendant he had been ready and was ready to receive the malt at Weedsport and pay for it, as provided by letters of June 18 and 20, any time he would notify plaintiff, &c. The plaintiff had a letter-press copy made of his original letter of June 20, and a duplicate of the letter. The plaintiff affixed a five cent revenue stamp on the letter press copy of the letter, and canceled it before the original was sent. He also affixed a five cent revenue stamp to the defendant's letter of June 18, the day after he received it, June 21. He did not know he had a right to stamp the defendant's letter until he took counsel. The original letter of the defendant to the plaintiff, of June 18, when read in evidence, had a canceled five cent revenue stamp on. The copy produced by the plaintiff of his own letter of June 20, when produced and read in evidence, also had on it a canceled five cent revenue stamp. The letter press copy of the plaintiff's letter was produced in evidence, and had a five cent canceled revenue stamp on also. Three canceled five cent revenue stamps were on the letters, at first.

On the trial, the plaintiff, to meet an objection made to the evidence, appeared before the United States collector for the district including Herkimer county, paid him ten cents, satisfied the collector that any omission to duly stamp the contract, at the time it was made, was by inadvertence, and not with any fraudulent intent to defraud the United States out of the stamp duty, or to evade or delay the payment thereof, and the collector remitted the penalty of \$50, and affixed and canceled on two five cent revenue stamps, said letters (making five five cent revenue stamps used in all,) and wrote and signed on said letters his certificate to that effect. The letters thus stamped, with the collector's certificate thereon, were then read in evidence.

At the close of the testimony, the court suggested that it would hear a motion to dismiss the complaint, founded on

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objections to the validity of the contract, the plaintiff being prepared to prove its breach and the amount of damages. Thereupon the defendant's counsel moved for a nonsuit on the following grounds :

1. All the letters taken together fail to establish any final and unqualified proposition on the one side to sell, and on the other to buy, as alleged in the complaint.

If the alleged contract is confined to the two letters of June 18 and 20, then the proposition of the defendant contained in his letter was not so accepted by the plaintiff in his answer as to fix and bind the defendant. The defendant was not bound to wait for the plaintiff until the 15th of July, at which time the plaintiff demanded performance and the alleged breach occurred.

2. The contract alleged is one which the statute requires must be in writing, and by act of congress, although in writing, was void unless stamped in the manner prescribed. Several of the letters relied upon never have been stamped. Nor was the contract stamped in any manner at the time when the rights of the parties became fixed.

If the contract was void by the act of congress at the time of the alleged breach, the plaintiff cannot recover in this action for a breach which is alleged to have occurred while the contract was so void for want of the proper stamps.

The court granted the motion on these two grounds ; to which ruling and decision the plaintiff's counsel duly excepted, and the court ordered that the exceptions be heard in the first instance at the general term.

*F. Kernan*, for the appellant. I. There are only three questions raised by this case. 1st. Does the evidence in the case fail, as a question of law, to establish a contract binding on the defendant, independent of the stamp question? 2d. Was the contract invalid, as a question of law, for want of a stamp? 3d. Was there any question for the jury touch-

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ing the validity of the contract? (This proposition is possibly embraced in the first two.)

II. The proposition in the defendant's letter of June 18 is a clear, distinct proposition, offering to sell on the terms specified, and *calling for an immediate answer*. The letter of the plaintiff of June 20 is an unconditional acceptance of the proposition in the very terms of the offer, and without qualification. The plaintiff says, "I will take your malt," &c. When the plaintiff mailed that letter at Ilion, a complete and binding contract was made between the parties. (6 *Wend.* 103. 1 *Kern.* 441. 20 *Barb.* 42. 4 *Paige*, 17.)

No time of delivery and payment being specified, the law supplies it. In such case the contract is, each party shall have a reasonable time in which to perform. And what is a reasonable time is to be determined in view of the circumstances of the case. (16 *Pick.* 227, 231. 2 *E. D. Smith*, 86. 3 *Sandf.* 585.) What is a reasonable time under the circumstances, is a question of fact for the jury. (3 *Sandf.* 585.)

III. Nothing in the last clause of the plaintiff's letter of acceptance, dated June 20, was intended to or did qualify his acceptance. It suggests no qualification. It contains not even an inquiry. It states when the plaintiff personally expects to be at Clyde, which may or may not be important information to the defendant. (20 *Barb.* 42, 47, 61. 4 *Paige*, 17.) Would that clause be any obstacle to the defendant suing the plaintiff on the contract? 1. The intent of the parties governs. (1 *Metc.* 9, 3.) It is manifest it was the intent of the plaintiff to accept the proposition, and both parties understood their minds had met on the terms of the contract. 2. The subsequent conduct of the parties is competent evidence to show their intent, and to confirm and ratify the contract. (1 *Cush.* 89. 13 *John.* 294. 6 *Wend.* 122, 123.) 3. The subsequent conduct of the parties shows clearly that each one intended to make a contract, and both parties supposed a contract had been concluded. Neither party at any time suggested that the acceptance was qualified, or that

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a contract had not been made. Three days after the plaintiff mailed his acceptance at Ilion, the parties met at Clyde. They read both letters, each of which was then stamped, and the plaintiff stated to the defendant he came to make arrangements to receive the malt. The defendant did not intimate that there was no contract, but proposed to fulfill it. He stated to the plaintiff he would deliver him the malt he had on boat in transit, if it was not sold in Albany, and if it was sold, he would deliver him the five thousand to six thousand bushels he had at Weedsport, and get the balance somewhere else, to fill the contract. This is conclusive evidence of what each party intended by his letter, and that their minds had met on a contract. 4. The contract being complete, an empty boat was to be obtained and sent to Weedsport. The defendant and his men, to deliver the large quantity of malt, were to be at Weedsport ready, and the plaintiff was to get his money and go to Weedsport when the defendant was there, or some one who could represent him. When the defendant made the proposition he was at Clyde, and when the plaintiff accepted it he was at Ilion. It was therefore eminently proper, if not necessary, without any intent to qualify the contract, to notify the defendant when he expected to be there, so that there might be no unnecessary delay. If the defendant was not to be at home then, or was otherwise engaged, he might make any suggestion he desired. 5. Suppose the last clause of the letter read: "I will come up and receive the malt, and pay for it the last of this week or the first of next," would that qualify the contract? He first fully accepts the defendant's offer, and then gives him that notice without imposing it as a condition to his acceptance that he should assent to it, or that he should fix that time as the day of performance. Any claim that it qualified the contract must rest solely on the ground that it extended the time in which the plaintiff was to receive and pay for the malt. And that would depend upon the question, whether the time named was a reasonable

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time for the conclusion of the contract within which to receive the malt, &c. If it was a reasonable time, then the time was not extended. And whether or not it was a reasonable time, was under all the circumstances a question of fact for the jury, which the court could not dispose of by a nonsuit. (3 *Sandf.* 585.) The time was a reasonable time, under the circumstances. It is clear the plaintiff intended by the last clause, to give the defendant notice when he would be up to receive and pay for the malt, so that he might beat home and in readiness to deliver. It had no relation to the making of the contract. It was a suggestion founded on a contract made, and looking to its performance. That is what the letter, fairly construed, means. That also appears from what the plaintiff said to the defendant, when he went to Clyde and saw him the same week, and in three days after the letter was written, "I told the defendant I had come up to make arrangements to receive the malt." Suppose the plaintiff had said, instead of that last clause: "If I come up the last of this week, or the first of next, will you be ready to deliver the malt?" would that have qualified the acceptance? It would be an inquiry touching the performance of the contract, not its making. Has he said more than that?

IV. The defendant is not at liberty to allege that the acceptance was qualified, as an excuse for his non-performance. He put his neglect, or refusal to perform, on an entirely different ground, to wit, the want of malt, &c. No such defense is specified in the answer, or was thought of until the trial, as that the acceptance was qualified. And if the clause in the letter in question qualified the acceptance, it was competent for the parties to waive it, and affirm the contract. They at least did that.

V. The contract in this case is evidenced by the letters, each of which is written by a person residing eighty miles from the other. Neither letter is signed by both parties. Both letters are necessary to prove the contract. It has been held to be a sufficient note or memorandum of the contract

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in writing, signed by the parties to be charged thereby to take the case out of the statute of frauds. But it is submitted that neither letter is a contract or instrument required to be stamped by the revenue laws. Neither paper is a contract. Neither party at any time has both papers, so that he can stamp them both. Neither could be made liable for the penalty for making or issuing a contract and not stamping it. Neither party has in fact signed a contract which can be proved only by *both* letters, (although they are held to sign sufficiently to avoid the mischiefs the statute of frauds was designed to guard against.)

VI. If the letters are adjudged to be a contract, which is required to be stamped by the revenue laws, it was sufficiently stamped. 1. A five cent revenue stamp was affixed to the letter press copy of the plaintiff's letter of acceptance, before the original was mailed and canceled. The very next day a copy of that letter was made, and another five cent stamp was put on that copy, and canceled. 2. The plaintiff put a five cent stamp on the letter the defendant sent him containing his offer, which was accepted the day after it was received. This letter was stamped before the plaintiff's acceptance could have reached the defendant. 3. Manifestly, if the party was required to stamp this contract, it was stamped as far as it was practicable to do so, and that is all that can be required. 4. The copy of the plaintiff's letter to the defendant, and the original letter of the defendant to the plaintiff, were each stamped with a five cent revenue stamp, canceled when the plaintiff saw the defendant at Clyde, June 23d, and were examined by both parties. Both parties were satisfied, and affirmed the contract, and agreed to perform it.

VII. It is clear that the contract is evidenced by the last two letters—those of the 18th and 20th of June. There was no fraud attempted on the revenue law. The duty was fully paid. At least three five cent stamps were used. The end proposed by the revenue law, so far as this contract is concerned, was attained. The government received the tax.

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VIII. The revenue law provides that any person who shall make, sign or issue, or cause to be made, signed or issued any instrument, without the same being duly stamped, or having thereon an adhesive stamp for denoting the duty chargeable thereon, "*with intent to evade the provisions of this act,*" (the revenue law) shall forfeit \$50, and such instrument shall be invalid and of no effect. The instrument is invalid only when the stamp has been omitted with intent to evade the statute. There is no pretense this is such a case. If there was even evidence of any such intent, it was a question of fact for the jury, and would not justify the nonsuit. (*Revenue Laws*, § 158.) 1. The fact that these stamps were used, is evidence that there was no intent to evade the statute. 2. The collector's certificate shows no intent to evade the statute. It was so proven before him, &c.

IX. If this was a contract which required a stamp, and it had not been stamped before, the stamping by the revenue collector was sufficient, and made the contract *as valid, to all intents and purposes, as if stamped when made or issued.* (*Revenue Act*, § 158.) The contract was not void, but it could not be used as evidence until the penalty was paid or remitted, and the instrument stamped. 1. The English stamp act provides that no contract can be used as evidence unless stamped, &c. Yet the contract is held not to be void and available from the beginning, when properly stamped. 2. One party cannot make a contract alone. If the contract was void, it was the same as though no instrument had been made. In that case, it could not be made a living, valid contract by one party. It is made such because the contract is not void, but cannot be used as evidence merely until the tax is paid. 3. By § 163 of the revenue act, as amended in March, 1865, (before the trial,) provides that no instrument made before that shall be deemed invalid and of no effect because it was not stamped, provided it is now stamped.

X. It is no answer to say the contract was not stamped when the alleged breach occurred. That question did not

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arise on the motion decided. Nor was there any decision on that point. Whether the plaintiff could recover, there being a valid contract, is a question which will arise on the whole case when it is presented. The question now is, was there—is there—a valid contract? But if the question was now before the court, whether a contract stamped by the collector was to be deemed valid from the time it was stamped, or from the time it was made or issued, we insist the statute makes it valid from the time it was made, (with such exceptions as are specifically made in the statute.) The statute so reads. So far as the parties are concerned, it is manifestly right they should be bound by their contract. The effect the want of a stamp shall produce on the contract is exclusively the result of the statute. It was competent for congress to say it should have no effect, or it should prejudice the parties only under particular circumstances. None of its provisions in this regard are to protect the parties or for their benefit, but simply to collect the revenue for the government. Parties act, and must act, on their contracts in view of the fact that any objection for want of a stamp can be cured.

There is no hardship in it. They can stamp the instrument themselves, and remove all questions, whenever they please. There is no trouble except in the desire of the party objecting to get rid of his own contract.

XI. Section 158 of the revenue act, as amended by the act of 1866, (page 45,) especially the last part of it, shows the intention of congress to be to make the instrument good from the time it was made.

*R. Conkling*, for the respondent. I. No error was committed by the court below in granting the defendant's motion to nonsuit the plaintiff on the ground that he had failed to establish an unqualified and final contract. 1. It was the duty of the court to give the legal interpretation of the papers submitted to it. 2. The letters and other evidence in the case fail to establish the unqualified acceptance and immedi-

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ate action required by the defendant's proposition to sell and deliver, as is alleged in the plaintiff's complaint. All the letters commencing June 10, 1864, were introduced by the plaintiff to establish the alleged sale and purchase, and are to be taken together. All the plaintiff's letters manifest the intention to come up and examine the malt, if the price suits, and that intention implies the right to reject the malt if not satisfactory ; therefore the contract was incomplete, and could not be enforced. Thus, June 10th, the plaintiff writes : "If the offer will warrant, I will come up and see it." June 15, he writes : "I see what you say about malt being mixed. \* \* \* If the price suits, I will come up and see the malt." June 20th, the plaintiff writes : "I will take your malt deliverable on boat at Weedsport." \* \* "I will be up as soon as I can get away from home, which will be the last of this week or fore part of next week." The plaintiff testifies : "On 23d June, when I went up, I had no boat there to receive the malt, and no money beyond \$1000 ; this in a draft on New York, and I had a little spending money besides." These letters and this testimony indicate clearly an intention by accepting the price, to provide for an interval during which he could compel the defendant to hold the malt until he could examine it. No other construction of the letter of June 20th will account for the conduct of the plaintiff in going to Weedsport without money, or arrangement for money, to pay for the malt, and without boat, or arrangement for boat, to receive it. In construing a written instrument, it is proper to look at all surrounding circumstances. (2 *Cowen & Hill*, 1399. *Greenl. Ev.* 327. 1 *Barb.* 635. 3 *id.* 79, 87.) The letter of the defendant, June 18th, was to sell ten thousand bushels of malt at \$1.54, "*delivered* on the boat at Weedsport." The plaintiff's reply of June 20th, was for malt "*deliverable* on boat at Weedsport." The use of the word deliverable was not accidental. The plaintiff carefully selects it in his letters of both the 15th and 20th of June. It means, and was intended to give the plaintiff an option, as to

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when and whether he would take it off by boat, and would compel the defendant, as the plaintiff demanded; and has alleged in his complaint, to handle over in his warehouse the whole of the 10,000 bushels twice, once to weigh it preparatory to its being loaded, and before the delivery thereof, and a second time to handle it all over again in delivering it on to a boat, when the plaintiff thereafter should have one in readiness. This was not an acceptance of the defendant's proposition. That proposal required the plaintiff's prompt attendance with his money and his boat, and involved only once handling the 10,000 bushels, as it would be weighed simultaneously with delivery on boat. The plaintiff's proposal of June 20th, to be up the last of that week or fore part of the next, was not an acceptance of the defendant's terms. It was no part of the defendant's offer in his letter of the 18th of June, to wait for the plaintiff until the last of that week or the fore part of the next week. He did not agree to risk the fluctuations of the market. He had an agent at Albany, who might, and did sell 14,000 bushels of the malt, and actually had them shipped before the plaintiff's arrival. If the plaintiff delayed his arrival to the evening of the 23d, he did so at his own risk. This was five days after the writing of the defendant's letter, which gave no warrant for such a delay. Ordinary prudence and justice to the respondent required greater promptness in so large a transaction. (*Farmers' Loan, &c. Co. v. Hunt*, 16 Barb. 521.)

II. The contract alleged, is one which our statute requires to be in writing, and by the act of congress, approved July 1st, 1862, that writing was void unless stamped in the manner prescribed. § 110, subdivision first, of schedule B, requires every sheet or piece of paper, upon which an agreement or contract is written, to have upon it a five cent stamp. § 95, of the same act, declares that without such stamp, such instrument, document or paper, shall be deemed invalid and of no effect. (1.) To render a contract valid under this statute, the stamp must be affixed to the paper, which is the evidence

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of the contract or agreement between the parties. It cannot be a compliance with the letter or the spirit of the statute, to affix a stamp to a copy or duplicate thereof, remaining in the hands of the maker. There can be no pretense that a stamp was affixed to the original letter sent to Smith of 20th June. Myers testifies that "the copy" or impression taken from this letter, "was stamped before the original was sent." If the copy or impression in the letter book is deemed to be the *evidence* of the agreement, and a compliance with the law, then the contract is void because it was never delivered, but has always remained in the possession of the plaintiff. The supposed contract was not stamped in any manner at the time when the rights of the parties became fixed. The stamps which have been since affixed, do not revert back so as to put the defendant in default, or give the plaintiff a right of action, as of the time mentioned in the complaint. The plaintiff, by procuring stamps to be affixed to the duplicates of the letters of the 18th and 20th June, 1864, in his possession on the 3d day of May, 1865, by L. L. Merry, collector of the 20th district, is estopped from claiming that they had been properly stamped before that time. (2.) The second proviso of the 158th section of the act of congress, approved March 3d, 1865, cannot apply to this case. The "hereafter," of June 30, 1864, cannot go back to June 20th. All the existence this contract ever had was not later than the 20th. The second proviso of this section contemplates the appearance before the collector of the person who signed the instrument proposed to be stamped, as he is the person who should have affixed the stamp; he it is who *has not affixed the stamp*, and such neglect or omission can only be remedied by him, or with his consent. The words "he or they shall appear before the collector of the revenue," are applicable to the maker of the instrument, and not to "any other party having an interest therein." Such party having an interest, who may be desirous of having a stamp affixed can only effect that object by inducing the maker or person to be affected by it, to appear

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before the collector of the *proper district*, and personally direct or consent to affixing the stamp, and without this the collector is not authorized to affix the stamp. This construction is sustained by the power given to the collector in this section, to remit the penalty incurred by the omission or neglect to affix the stamp at the proper time. The neglect or omission to affix the stamp, renders the contract void ; therefore none other than the party to be bound or affected by the act of affixing the stamp, can direct or authorize the collector to act for him.

Myers testifies, " I put the stamp on defendant's letter of June 18th, the day after it was received ; \* \* \* he received it on Monday, June 20th." From this it is evident that the letter of 18th June, (Smith's,) was not stamped until June 21st and then by Myers, and not by Smith, or by his consent or direction. In regard to the copy of the letter marked "C," which appears on its face to have been stamped and canceled on the 20th day of June, the day of its date, Myers testified, on cross-examination, " this duplicate was made after the original was sent. It was copied from the letter book the next day after the letter was sent. This stamp was canceled same day copy was made." It follows, that the copy was not made or stamped until the 21st day of June. He says he called on an attorney at Herkimer, before he stamped it, and it was not canceled until three or four days after he was at Clyde, (25th June.) Consequently, neither the affixing of the stamps to Smith's letter, and the copy of the plaintiff's answer thereto, on the 21st June, 1864, nor that of 3d May, 1865, by the collector, were such a stamping of the supposed contract as is contemplated by the act of congress, which imposes the duty of affixing the stamp upon the party to be bound by it, and subjects the party whose duty it is, to penalties for the neglect. It is as much a personal act as that of affixing the names, and cannot be performed by another without express authority. The pretended contract is, therefore, void for the want of a stamp. (*Hoppock v. Plato*, 30 *How. Pr. R.* 120.)

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III. There was no contract such as that alleged in the complaint. 1. If there was any contract, it was that the plaintiff should be at Weedsport with the money to pay for, and a boat to receive the malt, within a reasonable time, and without delay; but it is not so alleged. (*2d Parsons on Contracts*, p. 47, 4th ed.) 2. There was no contract to wait till July 15th, as alleged in complaint. 3. There was no agreement to weigh the malt, as alleged. (*See 2 Stark. Rep. 292, as to effect of stamping.*) 4. If the plaintiff was entitled to receive, and bound to take, the malt on boat without examining it, as alleged in the complaint, it should have been described as mixed spring and winter made malt. 5. The plaintiff's letter of the 20th of June, was for malt *deliverable*. That word is not synonymous with the term delivered. (46 *Barb.* 143. 15 *Wend.* 637.)

IV. It was the province of the court below, to decide what was a reasonable time within which to comply with the defendant's terms, upon the facts and circumstances as presented by the plaintiff, and its decision was right. (*2d Parsons on Contracts*, 48, 49, 4th ed. *Farmers' Loan, &c. Co. v. Hunt*, 16 *Barb.* p. 522.) The plaintiff did not go to Weedsport, ready and willing, or for the purpose of paying for and receiving the malt, as alleged in complaint. He went without any respectable portion of the purchase money, and without any arrangements for money or boat. In order to entitle the plaintiff to a delivery of the malt, it was necessary for him to make a tender of the money. (*Atkin and others v. Davis*, 45 *Barb.* 44.) There was no reasonable time given to the plaintiff to determine whether or not to receive the malt, or to be ready to perform on his part. The plaintiff was not prepared to pay, and never tendered the money for the malt until July 15th. The court properly held that this was too late. The plaintiff was bound to engage a boat and hands, and have them ready at Weedsport, as is alleged in his complaint. There was no evidence on the trial, that this was ever done. The defendant, although under no obligation, did

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what he could to remedy the difficulty occasioned by the plaintiff's negligence. He went immediately to Albany, to see if he could let the plaintiff have the malt, but found that it had been sold.

*By the Court*, BACON, J. The primary, and, indeed, vital question in this case is whether there was a contract between these parties—an agreement upon which their minds met, executed and complete, or whether it was a negotiation inchoate and unperfected until something should intervene and be determined, in order to give it full effect. The counsel for the plaintiff is entirely right in claiming that a proposition made by one party by letter to another party at a distance, containing a specific offer which is unconditionally accepted by the latter, will constitute a valid contract between them. There are not many cases in the books on this subject, but they speak a uniform language, and state the rule with a clearness that cannot be mistaken.

The leading case in this state is *Mactier v. Frith*, (6 Wend. 103,) and without recapitulating the facts in that case, it will be sufficient to say that it establishes the proposition that a bargain, evidenced by an offer in writing on one part, accepted on the other, is to be deemed closed when nothing mutual between the parties remains to be done to give either a right to have it carried into effect; that from the moment when the minds of the contracting parties meet, signified by overt acts, the contract is obligatory, and that whatever amounts to the manifestation of a formed determination to accept an offer of a contract of sale communicated to the party making the offer, is an acceptance which will bind the bargain.

This case was followed, and its doctrine applied, in *Clark v. Dales*, (20 Barb. 42,) where the proposition was by letter, as follows: "We will engage to furnish you a boat load of flour the last of next week, same quality sent Gilchrist and Mozer, at \$4.76, free to boat." The answer returned was, "We will take the load of flour as per your proposition of

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the 30th inst." Here, as the court say, the proposition was explicit, and its acceptance unqualified. It fixed the price, quality and quantity of the article, and the place of delivery and the time, with sufficient certainty, and was accepted without qualifications, and was therefore complete, and could not be rescinded by either party without the consent of the other.

Bearing these rules in mind, let us look at the alleged contract in this case, and ascertain whether it contains the necessary elements of a complete and obligatory agreement. The complaint alleges that on the 20th of June, 1864, these parties made an agreement in writing, duly subscribed and executed by them, whereby the defendant should sell and deliver to the plaintiff, on boat at Weedsport, ten thousand bushels of malt, at a certain price, which price should be paid on the delivery of the malt, pursuant to the agreement. This is the substance of the complaint, so far as it alleges the existence and character and terms of the contract.

On the trial, the plaintiff commenced by producing the letter of the plaintiff of June 10th, and following it with the correspondence on both sides, until the closing letter of June 20th, by which he claimed the contract was completed. I think the letters are all essential to the case, and that they aid in the conclusion for which we are seeking. Taken together, they manifest an intention on the part of the plaintiff to visit the defendant before the final close of the negotiation, and that, either for the purpose of inspecting the article the plaintiff proposed to buy, or to determine more definitely the time, place and mode of delivery, and until some one, or all of these things were determined, the contract could not be deemed consummated. Thus, on the 10th of June, the plaintiff, after some inquiries about malt, and the terms on which it would be offered, says : " If the offer will warrant, I will come up and see it." On the 15th he writes again, soliciting an offer, and adding : " If the price will suit, I will come up and see the malt." On the 18th of June the

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defendant answers, stating the terms on which he would sell ten thousand bushels of malt "delivered on the boat at Weedsport," and to this, on the 20th, the plaintiff replies by letter stating that he would take the malt on the terms stated, "deliverable on boat at Weedsport," and adds: "I will be up as soon as I can get away from home, which will be the last of this week, or the fore part of next." The plaintiff having, in both letters, prior to the 20th, declared his purpose to inspect the malt prior to closing any contract, and on the 20th reiterated his purpose to visit the defendant, the latter was entirely warranted in assuming that the matter was open to further negotiation, and no contract was, or could be closed until that personal inspection had taken place.

Upon these letters, coupled with the oral evidence touching the conduct of the parties, the court ruled that all the letters, taken together, failed to establish any final and unqualified proposition on the one side to sell, and on the other to buy, as alleged in the complaint; and further, that if the alleged contract is confined to the two letters of June 18th and 20th, the proposition of the defendant, contained in his letter, was not so accepted by the defendant in his answer, as to fix and bind the defendant; and upon this, and another proposition which arose in the case, the plaintiff was nonsuited.

Viewing the letters in their connection and sequence, and as evidential of the purpose of the plaintiff, I think that this ruling was right. The intention to accept the price offered is clear enough, but the letters indicate to my mind with equal clearness that an interval was provided for, during which the malt was to be held by the defendant until the plaintiff could not only examine it, but determine in what manner it should be disposed of. The conduct of the plaintiff lends very strong confirmation to this conclusion, and is hardly susceptible of explanation on any other theory. He went up to Weedsport on the 23d of June, but he went, substan-

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tially, without any funds to pay for the malt, and without any arrangement to procure funds for the purpose of payment, and not only without any boat, but without any arrangement to procure a boat, with any view to an immediate or ulterior delivery of the malt.

But again, if we confine ourselves solely to the letters of June 18 and 20, the acceptance was not in the terms of the offer so as to fix and bind the defendant. The offer was to sell the malt in question "delivered" on the boat at Weedsport. The acceptance was of the malt "deliverable" on boat. This is, it seems to me, a manifest variance from the terms of the offer. The words do not mean the same thing; they require, or may require something to be done quite different as one or the other should be exacted. If the defendant was only required to deliver on boat, the operation was very simple; it only obliged the defendant to deposit the malt in the boat, necessitating but a single process of handling and weighing. But suppose the plaintiff was uncertain whether he would have it delivered on a boat; that it might perchance be a good speculation to effect a sale to a third party who might choose some other method of removal. This might, and I think would, require the defendant to separate and handle and weigh the whole 10,000 bushels and hold it ready for delivery in any manner, and perhaps at any time, the plaintiff might direct; and if the plaintiff at some future convenient season should conclude to have it delivered upon a boat provided by him, it would require the whole mass to be again handled, weighed and delivered. An acceptance must be in the words of, or must be entirely accordant with, the terms and conditions of an offer, to bind a party who makes the proposition. In this case, the variance made the acceptance a different thing from the offer. As thus expressed, it could not have been claimed by the defendant to be binding on the plaintiff, and he could not have maintained an action for its alleged breach; and for this reason, as well as upon the ground that there was a contingency expressed in the

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letter, to wit, the visit of the plaintiff to the defendant and an inspection of the malt prior to a full close of the negotiation, the defendant could not have enforced it as a valid contract against the plaintiff, if he had repudiated its obligations. A contract of this nature must be mutual in its obligations, or it has no binding force upon either party.

I have not deemed it important to consider what effect the subsequent conduct of the parties has upon the question of whether or not there was a binding contract of sale as alleged by the plaintiff. There is certainly nothing in the acts or declarations of the defendant which can be affirmed as a ratification and assent to the terms of the contract, either directly or by implication. What he attempted or expressed a willingness to do, if it could be accomplished, was entirely voluntary on his part, and the effort failing, did not attach to him any liability as for a breach of contract.

The offer and tender, such as it was, by the plaintiff on the 15th of July, might, if that question had fairly and necessarily arisen, have been held by the court as entirely too late. The court did indeed hold that the defendant was not bound to wait until the 15th of July for the plaintiff to demand performance, and I see no error in the ruling. But the question does not seem to me to have any importance in this case. If there was no valid and existing contract between these parties, as the court held, and rightly as I think, then any offer or tender on the part of the plaintiff to perform on his part would be of no importance. Such an offer, however complete, gives no vitality to that which has no life in itself. An offer and demand of performance may be necessary to atone for an apparent laches and to put the other party in default, but they assume the existence of a contract of which the party offering and demanding has a right to require the performance, and they have no effect where there is no existing and obligatory contract to which they may be referred, and to which they are a necessary supplement.

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There was another ground on which the motion to nonsuit the plaintiff was granted, to wit, that the alleged contract was not stamped as required by the revenue act. The contract claimed in this case was evidenced by the two letters of June 18 and 20, and consequently both were required to be stamped. The letter of the 20th transmitted to the defendant never was stamped, but a copy in the plaintiff's letter book was stamped, and the plaintiff testifies that on the day after its receipt he stamped the defendant's letter of the 18th and he canceled them both. There is no pretense that the defendant ever stamped his letter, and no proof that he ever saw the stamp after it was affixed, and consequently there can be no claim that he ever assented to the stamping or the cancellation. I am of opinion that this is no such stamping as the act requires, and this being so, the paper is void.

The act (§ 151) provides that the stamp duty shall be levied upon and collected in respect to the paper upon which it is placed, from the person or party who shall make, sign or issue the same, and a subsequent section provides that the person using or affixing the same shall write the initials of his name and the date when the same is affixed. It is clear to my mind that the person executing the document which requires the stamp is the one to affix it, and that in any event it cannot be affixed, nor the cancellation be made by another party, without the actual knowledge and express or implied assent of the party who issues the paper on which the stamp is placed, neither of which things existed in this case.

The stamping by the collector did not remedy the difficulty. Waiving the question whether this could be done so as to relate back to the date of the letter and render it valid from that time, it seems very clear that the person who is to appear before the collector to procure the stamping and cancellation is the person who issued the paper and who should have affixed the stamp. He it is upon whom the penalty by section 158 is imposed, and he can only be relieved by appearing and making the application and securing the indemnity.

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If a party having an interest in the paper shall desire it to be thus stamped for his benefit, he can only effect it by procuring the maker or party to be affected by it to appear before the collector and procure the stamping and cancellation. Without his knowledge, and against his presumed assent, it surely cannot be done, and in this case there is not only no pretense of either knowledge or authority, but it was done at a time and in a manner to which the defendant would most strongly have dissented.

On both grounds, I think, the nonsuit was properly granted, and that the motion for a new trial should be denied, and judgment ordered for the defendant.

Judgment accordingly.

(ONONDAGA GENERAL TERM, April 2, 1867. *Morgan, Bacon, Foster and Mullin*, Justices.)

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D. KELLOGG LEITCH, GEORGE LEITCH, and DAVID K. LEITCH, by his guardian, Israel S. Spencer, *vs.* HENRY WELLS, president of The American Express Company, impleaded with The Bank of Syracuse and The Tompkins County Bank.

A testator, by his will which took effect by his death in May, 1836, gave and bequeathed unto the three executors named therein, their executors and administrators, the sum of \$25,000, upon trust to pay the interest, at the rate of seven per cent per annum, to his daughter, Mrs. L., for her sole and separate use during her life, exclusive of her husband; and from and after her decease, then as to the said sum of \$25,000, in trust for her child or children, living after her death; if more than one, then equally to be divided between them.

In May, 1850, all of the executors having become insolvent, a receiver was, in an action brought by a residuary legatee, appointed of the property, both real and personal, of the estate, to whom, in October, 1851, the executors, under the direction of the referee, conveyed and assigned all the said estate, "excepting and reserving a certain fund of \$25,000, consisting of shares of

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capital stock in the Tompkins County Bank, amounting to \$12,700, and shares of the capital stock in the Bank of Syracuse, amounting to \$7,800, and shares in the capital stock in the Onondaga County Bank, amounting to \$5000," with the certificates and vouchers appertaining thereto, "which" (it was stated) "*has been set apart*" and appropriated by the assignors as such executors and trustees, for the said sum of \$25,000; which fund was not to pass under the assignment. At the time of this conveyance, the estate owned one hundred and twenty seven shares of the capital stock of the Tompkins County Bank; ninety-nine shares of the stock of the Bank of Syracuse; and one hundred and five shares of the stock of the Onondaga County Bank; each of the par value of \$100.

Subsequently the receiver, by an arrangement with the executors, reconveyed to them, as such executors, all the property remaining unadministered by him as receiver. L. and C., two of the executors, died in 1855, leaving K. the sole surviving executor.

Up to and until 1858, the said shares of bank stock which had been so set apart as and for the said fund of \$25,000, remained in the hands of the executors during their joint lives, and in the hands of K. as such survivor, and stood in their names as executors on the books of the banks. In January, 1858, and August, 1858, K., by instruments in writing upon the transfer books of the banks, respectively, signed by him as executor, assigned the said shares of bank stock belonging to the estate directly to his wife P. K. without any consideration, received the scrip therefor in her own name, and said shares had ever since continued to stand in her name on the books of said banks. She subsequently signed blank powers of attorney for the transfer of the bank stock, and delivered the same to K.

On the 30th of May, 1862, K., to secure a loan of \$1100 to him from the American Express Company, caused the ninety-nine shares of stock in the Bank of Syracuse to be transferred to the express company, by delivering to it scrips of said stock, standing in the name of his wife, with a blank power of attorney attached, signed by her, but not acknowledged. Such stock was never transferred to the company on the books of the bank.

On the 25th of March, 1864, K., to secure a further loan of \$10,000 to him from the same company, caused one hundred and seven shares of the stock of the Tompkins County Bank, standing in his wife's name, to be transferred to the company by delivering to the company a scrip for said one hundred and seven shares, with a blank power of attorney attached, executed by his wife; but no transfer of said one hundred and seven shares was ever made to the company on the books of the bank.

In November, 1861, Mrs. L. and her children commenced an action against K. and his wife to recover the legacy given to them, claiming the stock in the Tompkins County Bank, as having been set apart for their benefit, as a portion of the legacy of \$25,000, and that the transfer thereof by K. to his wife was without consideration and void. Mrs. L. died October 3, 1862. The action was continued in the names of her administrators and children.

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In November, 1868, a supplemental complaint was served, in which it was alleged that the seventy-three shares of stock in the Bank of Syracuse was also set apart as a portion of said fund of \$25,000, and that the same had also been transferred by K. to his wife, without consideration; and claiming that all of said stocks belonged of right to the plaintiffs. The court decreed, in that action, that by the setting apart of said stocks Mrs. L. and her children became the owners and vested with the absolute title thereto; and that the sale and transfer to P. K. was void, and vested in her no title to the same.

The first loan from the express company to K. was obtained, and the transfer of stock to secure the same made, while the action upon the *original complaint* was pending. But that company, at the time of such loan and transfer, had no actual knowledge of the pendency of that action; or of any claim of Mrs. L. or her children to the stocks; or that K. was an executor and trustee under the will of the testator. And no injunction was obtained, or receiver applied for, in that action.

The express company, claiming to own the stocks so assigned to it, had demanded of the Bank of Syracuse and of the Tompkins County Bank that they should severally transfer to it the stock so standing on their books in the name of P. W.; and the company, on demand, refused to deliver to the plaintiffs in this suit, the children of Mrs. L., the scrip for said stocks.

*Held* 1. That the testator, by his will, created a trust fund of \$25,000, out of his estate, which he conveyed thereby to his executors, to the income of which Mrs. L. was entitled, during her life; and that at her death, the principal of the fund vested in her children her surviving; but that no particular property being designated by him as constituting such fund, the same remained with, and constituted a part of, the whole of the estate of the testator in the hands of his executors; and while so situated, a transfer by the executors, of the specific property constituting the estate, would convey a good title to the purchaser, unless he was a party to a fraud to be perpetrated by such transfer.

2. That when the executors, in October, 1851, executed the assignment to the receiver, of all the residue of the estate, except the fund for the payment of the \$25,000, and excepted thereout and set apart, in express terms, the seventy-three shares of stock in the Bank of Syracuse, the one hundred and twenty-seven shares of stock in the Tompkins County Bank, and the fifty shares of stock in the Onondaga County Bank, it became thereby separated from the residue of the estate, and the relation of the executors became charged, so that thereafter their interest in it was merely that of trustees; while all their duties as executors, only, became vested in the receiver.

3. That in view of the facts, that the shares of stock so set apart were separated from a larger amount of stocks in the same banks, owned by the estate; that they were so continued separate until the transfers from K. to his wife; and that although such transfer to her included larger amounts of stock, the scrip issued to P. K. for seventy-three shares of stock in the Bank of Syracuse, and produced in evidence, showed that such transfer

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- of the residue must have been made in separate scrip; it was not only clear that the executors impressed it with the character of a trust fund, as and for the said fund of \$25,000, but that they had no power afterwards to change the fund, without the consent of the *cestui que trust*, or the order of the court.
4. That Mrs. L. was entitled to the *whole* net income of the stocks, during her life, and her children were entitled to the stocks at her death; and if, at any time after the trust was created, they had become worthless, from the failure of the banks, the loss would have fallen upon Mrs. L. and her children; provided there was no fraud, or want of good faith, on the part of the trustees.
  5. That the plaintiffs had the equitable title to the stocks in question, which vested in them at the death of their mother, Mrs. L.; and they had a right to require of the surviving executor a transfer of the scrip to them, and were entitled, after the death of their mother, as her next of kin, to an accounting by the executor, for the income which he had received from the stocks, and any income not paid over which he had received on the trust fund of \$25,000 before it was merged in the stocks.
  6. That while the action brought by Mrs. L. against K. and his wife, to accomplish these purposes, and continued by her administrator and children, after her death, was pending, the express company could not acquire the legal title, legal or equitable, to the Tompkins County Bank stock, against the present plaintiffs; because not only was that action pending when the company took the assignment of the stock, but the complaint therein *specifically* claimed the stock as a part of the trust fund; and as to that stock, the decision in the case, which held that the stock vested in, and belonged to, the plaintiffs, concluded the express company.
  7. That such action being pending at the time of the assignment of the seventy-three shares of stock in the Bank of Syracuse, by P. K. to the express company, it was notice to the company as to any thing which was part of the trust between the plaintiffs and K., on account of which the action was commenced, whether specifically stated or not; provided it could be brought into that action as constituting a part of the trust. That the decision in such action was therefore conclusive upon the express company as to that stock also, notwithstanding the complaint did not *specifically* claim it as belonging to the plaintiffs.
  8. That P. K. being a married woman, and the wife of K., she could not take a legal title to the stock by a direct transfer of it to her by her husband, merely because he held the stocks as executor; any more than if they had been his own.
  9. That the express company did not in *form*, even, acquire a *legal* title to the stock; the transfers not being made on the books of the bank; which was necessary to pass the legal title.
  10. That at most the express company took but an equitable title to the stocks; and if so, such equitable title must give way to the prior and superior equity of the plaintiffs.

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11. That the pendency of the action against K. and his wife was notice to the express company; and the judgment rendered therein made void its purchase of the stock of the Bank of Syracuse, as well as of the stock of the Tompkins County Bank.
12. That independent of that action, the express company acquired no title to the stocks, as against the plaintiffs.

**A** PPEAL from a judgment rendered in favor of the plaintiffs, at a special term, before MORGAN, Justice. The material facts are stated in the opinion.

*Van Vorst & Bradley*, for the appellant.

*Pratt, Mitchell, & Brown*, for the respondent.

*By the Court*, FOSTER, J. The action was brought to compel the defendant, The American Express Company, to transfer to the plaintiff 107 shares of the capital stock of The Tompkins County Bank, and 73 shares of the capital stock of the Bank of Syracuse; and account for and pay over to the plaintiffs the dividends which it had received thereon; to enjoin it from transferring the stock to any other person; and to have the same declared and adjudged to be the property of the plaintiffs. Also to restrain the other defendants from transferring the said shares of the capital stock to their respective banks, or allowing the same to be transferred on their books, to any person other than the plaintiffs.

The issues joined in the action were tried before his honor Justice MORGAN, at an adjourned special term, in June, 1865, and his findings of fact, which were supported by the evidence, are, in substance, as follows:

Daniel Kellogg, late of the town of Skeneateles, died in May, 1836, leaving a last will and testament, and appointing George F. Leitch, John Kellogg and David A. Comstock, executors. He left a large personal estate. The will was duly proved, and all of the executors qualified and entered upon their duties as such.

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One clause of the will gave and bequeathed "unto the said John Kellogg, George F. Leitch and David A. Comstock, their executors and administrators, the sum of \$25,000 upon trust to pay the interest, at the rate of seven per cent per annum, of the said \$25,000, to my daughter, Catharine K. Leitch, for her sole and separate use during her life, exclusive of her husband, and for which her receipt alone shall be sufficient discharge; and from and after the decease of my said daughter, Catharine, then as to the said sum of \$25,000, in trust for her child or children living, after her death; if more than one, then equally to be divided between them."

In 1848, Augustus L. Converse, as administrator of Mary Ann Converse, who was one of the daughters of Daniel Kellogg, and one of the residuary legatees, commenced an action against all of the executors, to compel the payment of her residuary interest in the estate; and in May, 1850, all of the executors having become insolvent, upon proceedings taken in that action, Elias W. Leavenworth was appointed receiver of the property, both real and personal, of said estate, and the executors were ordered by the court to convey and assign to the receiver, under the direction of a referee appointed by the court, all of said estate then in their hands.

On the 10th day of October, 1850, the executors, in pursuance of the order of the court, by an instrument under their hands and seals and under the direction of the referee, conveyed and assigned to the receiver all the said estate, both real and personal, "excepting and reserving from this assignment a certain fund of \$25,000, consisting of shares of capital stock in Tompkins County Bank, amounting to \$12,700, and shares of the capital stock in the Bank of Syracuse, amounting to \$7300, and shares in the capital stock in the Onondaga County Bank, amounting to \$5000, making the said sum of \$25,000, with the certificates and vouchers pertaining thereto, *which has been set apart* and designated and appropriated by the said parties of the first part as such executors and trustees, as for the sum of \$25,000 given to them in and by

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the said will of Daniel Kellogg, deceased, in trust to pay the interest thereof to Catharine K. Leitch, wife of the said George F. during her life time, and then in trust for her children, which fund is not to pass under this assignment."

At the time of this conveyance, the estate of Daniel Kellogg owned 127 shares of the capital stock of the Tompkins County Bank, the par value of which was \$100 per share; 99 shares of the stock of the Bank of Syracuse, of the like par value; and 105 shares of the stock of the Onondaga county Bank, of the like par value.

George F. Leitch and David A. Comstock died in the year 1855, and John Kellogg continued the sole surviving executor; but previous to their death, an arrangement was made between the executors and the other parties to the suit which Converse had commenced against them; in pursuance of which, Leavenworth, the receiver, reconveyed to them as such executors all the property remaining unadministered by him as such receiver; and up to, and until 1858, the said shares of bank stock which had been so set apart as and for the said fund of \$25,000 remained in the hands of the executors during their joint lives; and in the hands of John Kellogg as such surviving trustee, and stood in their names as executors, on the books of the said banks; and for a portion of the intermediate time, the dividends thereon were paid over to Catharine K. Leitch, towards the income of the said fund of \$25,000.

On the 2d day of January, 1858, John Kellogg, by an instrument in writing upon the transfer book of the Tompkins County Bank, signed by him as executor of said Daniel Kellogg, deceased, assigned the said 127 shares directly to his wife, Paulina W. Kellogg; and on the second day of August, 1858, by like instruments in writing upon the transfer books of the said Bank of Syracuse, and the said Onondaga County Bank, assigned to said Paulina W. Kellogg the said 99 and 105 shares of the said banks, respectively; and he received the scrip therefor, as well as the scrip for the 127 shares, in

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her name, in the usual form therefor ; and the 127 shares of the Tompkins County Bank, and the 73 shares of the Bank of Syracuse which were set apart as part of said fund of \$25,000, have ever since continued to stand in her name on the books of said banks.

Soon after the transfer of said stocks to Paulina W. Kellogg, she, at the request of John Kellogg, signed blank powers of attorney, in the usual form, for the transfer of stocks in corporate companies, and delivered them to him ; and she never, until that time, knew that the stock had been assigned to her. She never had the possession of any of the scrip. John Kellogg received the dividends upon it, the same after the assignment to her, as before, and the assignment was made to her without any consideration therefor.

In November, 1861, Catharine K. Leitch and the plaintiffs in the suit commenced an action against John Kellogg and Paulina Kellogg for the purpose of recovering the said legacy and the unpaid interest thereon ; and duly impleaded them in the action ; and, among other things, claimed in their complaint, that the 127 shares of the capital stock of the Tompkins County Bank were set apart for the benefit of the said Catharine and her children, as a portion of the legacy of \$25,000 so bequeathed to said executors upon trust, as aforesaid, and was treated by the said Leitch, in his lifetime, and by the said John Kellogg, as a trust fund in his hands for the benefit of the said Catharine and her children until he caused the same to be transferred to Paulina W. Kellogg, as aforesaid. And it further claimed that such transfer was without consideration, and was void. The defendants in that action answered the complaint, and afterwards Catharine K. Leitch died, on the 3d day of October 1862, intestate, leaving the plaintiffs in this action her only surviving children and heirs at law.

After the death of Catherine K. Leitch, that action was continued in the name of her administrators, and the present plaintiffs, as plaintiffs therein ; and on the 30th day of No-

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vember, 1863, a supplemental complaint was moved therein, in which, among other things, it was alleged that the said 73 shares of the capital stock of the Bank of Syracuse was also set apart as portion of said fund of \$25,000, and that the same had been also transferred by said John Kellogg to his said wife without her knowledge, and without any consideration therefor. And it was claimed that all of said stocks belonged, of right, to the plaintiffs. To which supplemental complaint, the defendants, John Kellogg and Paulina W. Kellogg, put in their answer.

While the action was pending, *upon the original complaint*, and on the 30th day of May, 1862, John Kellogg applied to the American express Company for a loan of \$11,000 upon his own note; and proposed to secure it with 124 shares of the capital stock of the Bank of Syracuse. He obtained the money—executed his note to the Express company for the amount, and caused the stock to be transferred, by delivering to the express company scrips of the stock of said bank, standing in the name of Paulina W. Kellogg, one of which scrips was in the following words: “\$7300. This certifies that Mrs. Paulina W. Kellogg is entitled to seventy-three shares in the capital stock of the Bank of Syracuse, transferable, on the books of the bank, only by herself, or her attorney duly constituted; one hundred dollars on each share of which is hereby acknowledged to have been received. Bank of Syracuse, August 2d, 1858.

73 shares. (Signed,) O. BALLARD, Cashier.”

Attached to which scrip, was a power of attorney, signed by Paulina W. Kellogg, in blank, but in the usual form, without acknowledgment by her; but the stock has never been transferred to the American Express Company on the books of the bank.

On the 25th of March, 1864, John Kellogg applied to the American Express Company for another loan of \$10,000, and obtained it upon his own note secured by a transfer of 107

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shares, being part of the said 127 shares of the capital stock of the Tompkins County Bank, which was standing in the name of said Paulina W. Kellogg, which transfer was made by delivering to the express company a scrip for said 107 shares, in the name of Paulina W. similar in form to the one for the 73 shares of the stock of the Bank of Syracuse, and with a blank power of attorney executed by her for the transfer thereof, similar to the one in reference to the stock of the Bank of Syracuse ; but no transfer of the 107 shares of stock has ever been made to the express company, on the books of the bank.

Afterwards, the issue in that action was tried, and on the 12th day of September, 1864, judgment rendered, by which it was ordered and adjudged, that by the setting apart of said stock by the executors, the said 127 shares of the capital stock of the Tompkins County Bank, and the said 73 shares of the capital stock of the Bank of Syracuse, were held by John Kellogg from the time of such setting apart until the death of said Catherine Leitch, in trust, to pay the annual income thereof to her ; and that upon her death, the plaintiffs in this action, her children, became the owners, and vested with the absolute title to said stock ; and that the same from that time had continued to be, and, still were, vested in these plaintiffs, together with all unpaid dividends thereon ; and that the pretended sale and transfer of the stock to the said Paulina was void, and vested in her no title to the same.

The express company, at the time of making such loans to John Kellogg, and receiving the assignments of the stock, had no actual knowledge of the action which was pending between these plaintiffs and their mother against John and Paulina W. Kellogg, or of any claim of the plaintiffs in this action to the stocks in question ; or that John Kellogg was an executor and trustee under the will of David Kellogg. And no injunction was obtained in that action restraining the transfer of the stock during the pendency thereof ; and no receiver was applied for.

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Before the commencement of this action, the express company claimed to own the stocks so assigned to it, and had demanded of the Bank of Syracuse, and of the Tompkins County Bank, that they should severally transfer the said stocks so standing on their books in the name of Paulina W. Kellogg, to the express company, and the express company, although the same had been demanded by the plaintiffs, had refused to deliver to them the scrip for said stocks.

The judge before whom the action was tried, at special term, without a jury, ordered a judgment for the plaintiffs, according to the prayer of the complaint.

It is perfectly clear, that by the clause in the will of David Kellogg, which is hereinbefore recited, he created a trust of a fund of \$25,000 out of his estate, which he conveyed thereby to his executors, to the income of which Mrs. Leitch was entitled during her life, and that at her death the principal of the fund vested in her children her surviving; but no particular property was designated by him as constituting such fund, and the same remained with, and constituted a part of the whole of the estate of the deceased in the hands of his executors; and there can be no doubt, upon sound principles, that while so situated, a transfer by the executors of the specific property constituting the estate, would convey a good title to the purchaser, unless he was a party to a fraud to be perpetrated by such transfer.

When the executors, in October, 1851, in pursuance of the order of the Supreme Court, executed an assignment (under their hands and seals, and under the direction of a referee,) to the receiver Leavenworth, of all the residue of said estate, except the fund for the payment of the \$25,000 and interest thereon; and excepted thereout, and set apart in express terms the 73 shares of stock in the Bank of Syracuse, the 127 shares of stock in the Tompkins County Bank, and the 50 shares of stock of the Onondaga County Bank, it became thereby separated from the residue of the stock of the deceased, and the relations of the executors became changed, so

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that thereafter their interest in it was merely that of trustees, while all their duties, as executors only, became vested in the receiver. And when the additional fact appears, that at that time the estate owned, in all, 127 shares of the Tompkins County Bank, 99 shares of the Bank of Syracuse, and 105 shares of the Onondaga County Bank ; and that the shares so set apart to constitute the trust fund, were separated from the residue of those stocks ; that they were so continued separate until the transfer from John Kellogg to his wife ; and although such transfer to her included larger amounts of stock, the scrip produced in evidence shows that such transfer of the residue must have been made in separate scrip. It is not only clear, that the executors impressed it with the character of a trust fund, as one for the said fund of \$25,000, but that they had no power afterwards to change the fund without the consent of the *cetuis que trust*, or the order of the court.

There is no doubt, under the facts of this case, that Mrs. Leitch was entitled to the *whole* net income of the stocks during her life ; that the plaintiffs were entitled to the stocks at her death ; and if, at any time, after the trust was created, they had become worthless from the failure of the banks, the loss must have fallen upon Mrs. Leitch and the plaintiffs, provided there was no fraud, or want of good faith, on the part of the trustees.

The plaintiffs, then, had the equitable title to the stocks in question, which vested in them at the death of their mother ; and they had a right to require of the surviving executor a transfer of the scrip to them, and they were entitled, after the death of their mother, as her next of kin, to an accounting by the executor for the income which he had received from the stocks, and any income not paid over which he had received on the trust fund of \$25,000, before it was merged in the stocks. And to accomplish these purposes, the action was originally brought by their mother and the plaintiffs, during her life, against John Kellogg and his wife ;

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and continued by the plaintiffs, and her administrator, under the supplemental complaint which was filed after her death.

The questions, therefore, are; *could* the express company, while that action was pending, acquire a title, either legal or equitable, to the stock, or any part of it, as against the plaintiffs, though it had no direct notice of the trial, or claim of the plaintiffs, and though it paid the full value of it? And if it could, then *did* it acquire a title to it which was superior to that of the plaintiffs?

Under our statutes, where the title to *real estate* is concerned, the pendency of an action therefor is not notice to a stranger until the notice of *lis pendens* is actually filed; and if in such case he has no actual notice, he may, in good faith, and for a good consideration, acquire the legal title, and maintain it against a party who claims the equitable title.

“The rule, however, which applies to *personal* estate, and which at common law applies to all estates, is general, that *lis pendens* is a general notice of an equity to all the world, (*Bouvier's Law Dic. title Lis pendens; Murray v. Ballou, 1 John. Ch. 577; and Murray v. Lylburn, 2 id. 444;*) where it is said “there is no principle better established, nor one founded on more indispensable necessity, than that the purchase of the subject matter in controversy *pendente lite*, does not vary the rights of the parties in that suit, who are not to receive any prejudice from the alienation. If the *cestui que trust* be entitled, as between him and his trustee, to take the securities for the land, at his election, it ought not to be in the power of the trustee to defeat that election by selling the securities. The litigating parties are not to have their right affected by any alienation during the pendency of the suit.” (*And see also Hayden v. Bucklin, 9 Paige, 514, 515; and cases cited in Bouvier's Law Dic. supra.*)

It is, therefore clear, that the express company could not acquire the title, legal or equitable, to the Tompkins County Bank stock against these plaintiffs; because, not only was the

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action above mentioned pending when it took the assignment of the stock, but the complaint which had been filed and served, *specifically* claimed *that stock* as a part of the trust fund; and as to that stock, the decision in the case, which held that the stock vested in and belonged to the plaintiffs, concluded the express company.

It is not so perfectly clear in regard to the seventy-three shares in the Bank of Syracuse; for at the time of the assignment of it to the express company, although the action was pending, the complaint did not *specifically* claim it as equitably belonging to the plaintiffs. But I have come to the conclusion that the action, as it then stood, was notice to the express company as to any thing which was part of the trust between the plaintiffs and John Kellogg, on account of which the action was commenced, whether specifically stated or not, provided it could be brought into that action as constituting part of the trust. And yet it must be conceded that there is no *lis pendens*, so as to charge strangers, until *after the filing of the bill or complaint*, as well as the service of the subpoena or summons, upon the defendant. (*Anonymous Case*, 1 Vern. 318. *Supplement to Vesey, Jr.* vol. 1, 284. *Hayden v. Bucklin*, 9 Paige, 514, 515. *Bouvier's Law Dic.* title *Lis pendens*, 2.)

I have said that the original complaint in that action did not specifically claim the shares of stock in the Bank of Syracuse; but it did claim, among other things, that in or about the year 1849, John Kellogg received from Leitch, his co-executor, 300 shares of the capital stock of the Bank of Syracuse; 100 shares of the Onondaga County Bank; 127 shares of the Tompkins County Bank; together with other property belonging to the estate of Daniel Kellogg. That afterwards he had transferred the same to his wife, without consideration, and for the purpose of defrauding the plaintiffs. The complaint also averred that the plaintiffs were not informed whether the whole of said legacy of \$25,000 was ever set apart and invested by the executors as directed by the will;

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but that they were informed and believed that the 127 shares of the Tompkins County Bank were set apart as a portion of the said legacy, and so kept till transferred to his wife as aforesaid. It also claimed that he was insolvent, but that he had the charge and control of a large amount of property held ostensibly in the name of his wife, consisting of *bank stocks*, bonds and mortgages, and real estate, amply sufficient to satisfy the legacy and the interest and income thereof; and that the same was a portion of the estate of Daniel Kellogg, &c. The complaint demanded an account by John Kellogg of his trust; and also an account by his wife of the money, choses in action, or other property then in her hands, being the proceeds of the estate of Daniel Kellogg; and that she be compelled to convey to the plaintiffs a sufficient sum, or amount, to make up any deficiency; and that John Kellogg be removed from his trusteeship, and for further relief.

As between the plaintiffs in that suit and John Kellogg and his wife, it was not necessary to insert in the supplemental complaint the allegations that the Syracuse Bank stock was also a trust, as part of the fund of \$25,000. In the original complaint, enough had been alleged to require John Kellogg and his wife to account as to all things concerning the original legacy of \$25,000, and to enable the plaintiffs to follow it through any mutations or changes which had occurred, unless it had become the property of a *bona fide* owner; and if upon the accounting in that action it appeared that the seventy-three shares had become a trust fund, then, without any amendment of the original complaint, (which contained a general prayer for relief,) the court could have given the same judgment that it did, to wit, that it belonged in equity to the plaintiffs, and was vested in them at the death of their mother.

It was not, therefore, a collateral matter, but was within the *original* issue, and was really as much a part of the subject in issue *then*, as it was afterwards under the supplemental complaint. And the farthest that any case has gone

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(which has come to my knowledge,) in deciding that a *lis pendens* is not notice to a stranger, who becomes a purchaser of personal estate, in good faith, and for valuable consideration, during the continuance of the action, is that of *Worsley v. The Lord of Scarborough*, (3 *Atk.* 392,) where, while it is expressly held that all persons who purchase a right in litigation are bound to take notice of what is transacting there, and are bound by the result, it is said, "*Thirdly*. No case has gone so far, and it would be very inconsistent if, where money is received upon an estate, and there is a question depending in this court upon the right of, or about that money, *but no question relating to the estate upon which it is received, but is wholly a collateral matter, that a purchaser of the estate, pending that suit, should be affected with notice*, by such implication as the law creates by the pendency of a suit." (And see 1 *Vesey's Supplement*, 284 ; *Self v. Madox*, 1 *Vern.* 459.) And it is quite as reasonable that a person who purchases *pendente lite* a chose in action not negotiable, (and when a purchaser ordinarily has to look to his vendor as his security for title,) which is in litigation in the action, should carefully inquire into the right of his vendor or assignor, as it would be to require of a *cestui que trust*, who commences a suit to recover the trust fund, that he should know and set out with precision, in his complaint, the changes which his trustee has fraudulently made of the trust fund. It is sufficient that he commences his suit to recover the fund, and sets out enough to enable those who desire to do so, to ascertain how far the litigation may extend ; and what property, or rights to property, may be involved in the decision. All this was done in that action, and it was the duty of the express company, as between it and the plaintiffs, to learn what were the real rights of Mrs. Kellogg to the stock which she assigned to it. And it will be recollected that in the action against Kellogg and wife, there was no dispute about the legacy of \$25,000, nor but that the mother and the present plaintiffs were entitled thereto ; nor but that it came to the hands of John Kel-

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logg in some form ; nor but that he was responsible for it ; but the real and only issue under the original complaint, as well as under the supplemental complaint, was what he had done with the fund, and how invested it ; and to what property or persons could the plaintiffs resort for its recovery.

The express company was also bound to take notice that the action was brought to remove John Kellogg as trustee, and for an accounting, and that he could not, therefore, while the action was pending, dispose of the trust fund, and was bound to inquire into the equities of himself and wife. And there is the more reason why it should be so, as the loans, to secure which the notes were given, and the stock assigned, were made to him. (*Murray v. Ballou*, and *Murray v. Lyburn*, *supra*.)

But independent of the action which was pending when the stocks were transferred to the American Express Company, did it acquire any title to them, either legal or equitable, superior to that of the plaintiffs ? I have already shown that they became a part of the trust fund long before they were so transferred. And from that time the plaintiffs had an equitable interest in them, which became vested in them as owners at the death of their mother ; and they were then entitled to a transfer to them of the legal title, not only as against John Kellogg, but also as against his wife ; and the court, in the action between them, so adjudged. Still, if it be the law that *that* action was not notice to the express company, then the questions as to the rights acquired from John Kellogg by his wife, and of the express company, derived from her, must be determined without resort to the judgment rendered in that action.

I need not spend time to prove, although Mrs. Kellogg, in form, took the legal title to the stock, in virtue of the transfer to her by her husband, that her title was fraudulent ; and that as between her and the plaintiffs, her claim to the stock, both at law and in equity, was void. If, however, she had the legal title, she might transfer one to a purchaser without

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notice and for a valuable consideration, notwithstanding her own title was fraudulently acquired, and hence it is important to inquire, in the first place, whether she ever had the legal title to transfer? She was a married woman, and the wife of John Kellogg, and she could not take a legal title to the stock by a direct transfer of it to her by her husband. Certainly she could not do so, if the stock had been his own; for, as a legal transfer, it would have been void; and the principle is not disputed, on the part of the defendant. But it is claimed, inasmuch as the stocks were in his hands, as executor, that he had the same right to transfer it to her, directly, that he had to transfer it to a stranger. No authority in support of such a proposition is cited by the defendant's counsel, and I have not been able to find any; and there is no reason, that I can discover, why such a rule should prevail.

The reason why a husband cannot convey a legal title directly to his wife, is not because the subject matter of the contract belongs to one of them, but because their relation to each other is such that they cannot make a legal contract with each other; and when equity is invoked to give to one or the other of them relief, it is confined to cases where it is called upon to protect the prior interests of the one or the other. And even equity would not interfere to protect a married woman, in a contract with her husband, where she had no prior interest to protect, and where she had paid no consideration. The policy of the law is to prevent legal bargains by married women with any person whatsoever, and especially with their husbands, except so far as they have been authorized to contract, by statute.

Mrs. Kellogg took, then, at most, so far as the defendant can claim, a mere equity. As such, it was subordinate to the equity of the plaintiffs. Theirs was a prior equity, and founded in justice. Hers was subsequent in point of time, acquired after theirs had accrued, and was fraudulent; and on the part of her husband, it was iniquitous. In truth, she

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had no equitable interest in the stocks, as against any one. I might rest the case here, upon this branch of it, because if she had but an equitable title at best, though in form it was a legal one, as between the plaintiffs and the express company, it could take no better title than she had to transfer.

But the express company was bound to know that Paulina W. Kellogg was a married woman; and should have made the inquiry, if it did not know it; and was bound to know that she had no right to sell, assign, or transfer stocks unless they were part of her separate estate, acquired in conformity to the statutes which allow a married woman to dispose of her separate property. The defendant was therefore bound to inquire how she became possessed of the stocks, and was chargeable with notice of how that was; and was chargeable with knowledge that being such married woman, and having derived her title to the stocks from her husband, that *she* had no legal title to them; and it was the further duty of the company to inquire what the title of her husband was; and it appearing that the transfer of the stock from her was delivered by her husband, and as collateral security for his own debts, the express company cannot complain that the security which it so obtained should yield to the prior and superior equity of the plaintiffs.

Again; the express company did not, in *form*, even, acquire a *legal* title to the stocks; the transfer was not made on the books of the banks, which was necessary to pass a legal title. (*Laws of 1836, p. 511, § 27, and Laws of 1838, p. 249, § 19.*)

It therefore, at all events, took but an equitable title to the stocks; and if so, it cannot be disputed that *that* equitable title must give way to the prior and superior equity of the plaintiffs.

1st. Then the pendency of the action against Kellogg and his wife, was notice to the express company, and the judgment therein made void its purchase of the stock of the Bank

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of Syracuse, as well as of the stock of the Tompkins County Bank.

2d. Independent of that action, the express company acquired no title to the stocks, as against the plaintiffs.

The judgment of the court below should be affirmed, with costs.

[ONONDAGA GENERAL TERM, April 2, 1867. *Morgan, Mullin and Foster, Justices.*]

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THE PEOPLE OF THE STATE OF NEW YORK *vs.* IRA B. GUTCH-  
 ESS and others, as petitioners, and RICHARD P. WATSON  
 and others, as commissioners of highways of the towns of  
 Mentz and Conquest, Cayuga county.

Where the legislature has asserted for the state the right to control a particular river, and has expressly declared it to be a public highway, by a public act, the state has the unquestionable right to control the use of the river, and to prevent the erection of any bridges or dams, or other works, which will obstruct the free use of the same as a public highway.

Whatever rights the public have in such a river, the authorities of the state are bound to protect, and a suit for that purpose is properly instituted by the attorney general, in the name of the people.

The public right in a river, upon the assumption that it is not navigable, in fact, is to be regarded simply as that of passage, as in a highway.

By declaring a stream a highway, the state does not acquire any title to the bed of the stream, or any higher or other right than it possesses in, or over ordinary highways upon the land.

If the state owns the bed of a river, or if it be a navigable river, in fact, then the law laid down in *The People v. The Canal Appraisers*, (38 N. Y. Rep. 461,) and *The Canal Appraisers v. The People, ex rel. Tibbitts*, (17 Wend. 571,) applies to it, and no one can lawfully construct a bridge over it, without the consent of the legislature.

The state government, in this particular, is the guardian of the rights of each and every citizen, which rights consist in an absolute and unqualified privilege, without let or hindrance, at all times freely to navigate any and every of the streams in the state, that is, at any season of the year, or at any stage of water therein, capable of navigation; and particularly so, if the legislature has by special act declared such stream a public highway.

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*Held*, in this case that, though the defendants, commissioners of highways, could not be permanently restrained from erecting a bridge over the *Seneca river*, as a free bridge, provided it could be constructed in such a manner as not to interfere with the free navigation of said river, if it should turn out upon the trial that the said river is not navigable, in fact, and that the state does not own the bed of the stream; yet that inasmuch as it was asserted on the part of the people that such river was a public navigable river, of the width of thirty-five rods, and of the average depth of eleven feet, and that the state owned the bed of the stream; and it appeared that the existing bridges across the river had been constructed under leave or authority from the legislature; the court ought, in behalf of the public interest, rather to assume that the state had the rights it claimed, till the truth could be otherwise established. An injunction was accordingly granted, to restrain the erection of the proposed bridge, until the hearing.

THIS action was brought to restrain the defendants, styled petitioners, from proceeding to obtain an order of this court to rebuild the so called free bridge over the Seneca river, which separates said towns, under the statute referred to in the opinion of the court. And to restrain the defendants, styled commissioners of highways, from erecting said bridge or executing any order that said petitioners may obtain secretly or otherwise, for that purpose. The complaint, among other things not appearing in said opinion, alleges that said commissioners of highways of the town of Conquest have never opposed said proceedings. That the predecessors in office of said commissioners, or Mentz did, by Mr. Gillespie their counsel, oppose said proceedings until the present commissioners of highways of Mentz by resolution commanded said Gillespie and all other persons opposing the same to cease and desist therefrom. And that all of said defendants, styled commissioners, are suffering said proceedings to advance unopposed, and to go by default, and are acting in concert with said defendants, styled petitioners, to procure an order of this court for the rebuilding of said bridge, and taxation of said towns, by default, and threaten to execute the same under the shield of a color of right. That the bridge in question was originally built for the pur-

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pose of a shunpike, by private individuals. Other facts in the case sufficiently appear in the opinion of the court.

Upon the complaint and affidavits an order was granted directing the defendants to show cause at the special term of this court in Rochester, in June, 1867, why a temporary injunction should not be granted.

*J. H. Martindale*, (Att'y Gen.) and *Geo. B. Gillespie*, for the plaintiffs. I. The Seneca river was navigable from the earliest settlement of the country, for boats, logs, and other craft, and now has navigable communication with the enlarged Erie canal at Baldwinsville, and unites with and forms the Oswego river, communicating with the Atlantic by Lake Ontario and the St. Lawrence river. (*See vol. 2, Doc. Hist. of New York*, pp. 617, 675, 680, 685, 690.)

II. It is declared to be a public highway, by statute, which makes it a misdemeanor and punishable by indictment or otherwise to obstruct its navigation in any degree by building or erecting thereon any works. (*R. L. 1813, vol. 2, ch. 67, §§ 1, 2.*)

III. Aside from the notorious fact of state reservation of title to the bed of said river in all the patents to individuals of land on its shores, the following acts of the legislature, among many others, permitting the building of bridges, free of toll, and dams across the same, towing paths, and locks upon its banks, expending large sums of money for dredging its channel and improving its navigability, from the earliest to the present time, in addition to the acts cited in relation to the Mohawk river (a more insignificant stream than the Seneca, 33 *N. Y. Rep.* 461-501,) furnish more abundant evidence of state ownership of the bed and control of the use of the water of this river than is ordinarily found. (*R. L. 1813, vol. 2, chap. 67, §§ 1, 2, supra. Laws of 1836, chaps. 123, 191, 303. Laws of 1837, chap. 294. Laws of 1841, chap. 106. Laws of 1843, chaps. 148, 180. Laws of 1845, chaps. 30, 318. Laws of 1846, chap. 469. Laws of 1850,*

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chap. 283. *Laws of 1853, chap. 524. Laws of 1858, chap. 179. Laws of 1862, chap. 465.*)

IV. As matter of law the ownership of the Mohawk river, a navigable stream, and the title to its bed, is in the people. (*People v. Canal Appraisers*, 33 *N. Y. Rep.* 461 to 501. *People v. Tibbets*, 19 *id.* 528.) For identical reasons the Genesee river is within the operation of the above decisions.

V. The common law rules as to where lies such title is not applicable to this country. (*People v. Canal Appraisers, supra. Lowber v. Wells*, 13 *How. Pr.* 454.) Therefore the distinction on this point between the Hudson and Seneca rivers is effectually obliterated.

VI. It is conceded by the defendants that no consent of the legislature was ever obtained to build the proposed bridge, and such consent is necessary, 1st. Where the stream is navigable. 2d. Where the state owns bed of stream. (*Fort Plain Bridge Co. v. Smith*, 30 *N. Y. Rep.* 63.)

The plaintiff did not succeed in this case because he was not in a situation to demand an injunction. The people, in the case then before the court, by their proper officer, the attorney general, did object. The court in that case wished the common law principles restored that denied to the legislature the right to *impair* franchises granted. (*See page 63, opinion.*) Since that decision, the Supreme Court of the United States has gone far to establish this common law principle, by holding that a franchise to a bridge company is a *contract* which the state could not violate. (*The Binghamton Bridge*, 3 *Wallace*, 51 to 85, *citing Hargrave's Law Tracts*, ch. 11, 16. *The Enfield Toll Bridge Co. v. Hartford and New Haven R. R. Co.*, 17 *Conn. R.* 63. *Hooper v. Cummings*, 20 *John.* 100. *Bowman v. W—*, 2 *McLean*, 283.)

VII. Legislatures have power to license ferries and bridges, and no individual can without license build a bridge or establish a ferry for general travel; and every ferry ought to be under public regulation. (*The Binghamton Bridge, supra.*)

VIII. The states have the power to authorize the building

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of bridges, and they always had it ; and it was not taken away by the federal constitution ; and when the revolution took place the people in each state became the sovereign, and in that character held *absolute right* to all the navigable waters, and the soil under them. (*Martin and others v. Waddell*, 16 *Peters*, 410.)

IX. So much regard is paid to the interests of the great body politic that if a river *ever has been* a public highway, even if it has not been used as such for a period of twenty years, and during the whole of the time has been in a condition inconsistent with public use, the *right* of the public is not extinguished. (*Angell on Water Courses*, § 254. *Vooght v. Winch*, 2 *Barn. & Ald.* 662. See *Commonwealth v. Inhabitants of Charleston*, 1 *Pick.* 180 ; *Inhabitants of Arundel v. McCulloch*, 10 *Mass. R.* 70.)

X. It matters not *how far* the erection would constitute an obstruction. (*Inhabitants of Charlestown v. County of Middlesex*, *supra*.)

XI. If the proposed bridge would not interfere with navigation, and would not be even a nuisance in fact, it would nevertheless be a *nuisance* and a *purpresture* in law. (*People v. Vanderbilt*, 28 *N. Y. Rep.* 396. *Waterman's Eden on Injunctions*, vol. 2, p. 259.)

XII. It would not help the defendants even if the bridge, on the whole, was a public necessity or benefit. (*Rex v. Ward*, 4 *Adolph. and Ellis*, 384. *Regina v. Betts*, 22 *Eng. L. and Eq.* 210. *Davis v. Mayor, &c. of N. Y.*, 14 *N. Y. Rep.* 525.)

XIII. If it interferes with a *public right*, the public advantages will not all be considered. (*Davis v. Mayor, &c. supra*.) It would be calling upon the court to usurp the powers of the legislature.

XIV. The attempt to erect this bridge is an effort to usurp a franchise ; because a bridge is a substitute for a ferry. (15 *Wend.* 133, *per Savage, J.*;) and the right to establish a ferry is a franchise, vested exclusively in the sovereign, and

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no person can establish a ferry without sovereign authority. (*Ex parte Jennings*, 6 Cowen, 518, note. 5 Seld. 454, per Selden, *J. Blunt v. Hart*, Willes, 508. *Turnpike Co. v. Ryder*, 1 John. Ch. 611. *Newburgh Turnpike Co. v. Miller*, 5 id. 101. 3 *Kent's Com.* 10th ed. 459, note.)

XV. The fact that the bridge is designed to be free makes it no less a franchise. (*Angell & Ames on Corp.* § 4.) The exercise of any franchise without legislative sanction is an usurpation, and a *public nuisance*, and subjects the party to public prosecution. (5 Seld. 444, 445.)

XVI. But it is alleged in the answer that the plaintiffs are debarred by lapse of time.

The foregoing propositions being unquestionably correct, the proposed bridge, be it erected in any manner without sovereign authority, will be a nuisance in law or in fact, or both, if either. Then no lapse of time can prescribe for it. (*People v. Cunningham*, 1 Denio, 536. *Mills v. Hall*, 9 Wend. 315. *Weld v. Hornby*, 7 East, 199. *Roscoe Crim. Ev.* 739, 740. *The city of Rochester v. Erickson*, 46 Barb. 95.) And no laches can be imputed to the government, and against it no time runs, so as to bar its rights, in this behalf. (*Ang. on Water Courses*, § 254.)

Again; prescription presumes a grant to some person. No person is named as grantee, and the proceedings we ask to enjoin are instituted for the purpose of ascertaining the putative father of this bastard erection.

XVII. The question of *ordinary* liability of towns to repair bridges built by individuals, and afterwards used by the public, is immaterial in this action.

XVIII. There is no act repealing expressly, or indicating any intention whatever to repeal, the act of 1813.

XIX. The report of the referee, and exhibits annexed, cannot be considered in this action. 1st. Because neither the statute nor the order of reference allow him to report any thing but the *evidence*. He assumes to report *facts*. 2nd. It is attempting to foist before the court for its consideration

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the proceedings which are by the order to show cause enjoined—doing that indirectly which cannot be done directly.

XX. For the defendants to deny threatening to erect the bridge in question, when actually attempting to procure an order by default for that purpose, is idle. To deny the title and control of the plaintiffs of this river for the purpose of being temporarily rid of the equities of this bill is to belie the official history of this state; to attempt to hide from the eye of this court that which it is legally bound to take judicial notice of; and to ignore the latest adjudications of the highest judicial tribunals of this state and of the United States.

*H. V. Howland*, for the defendants. I. This bridge having been taken and used by the public for the purposes of travel, exclusively, the towns are bound to keep it in repair, without regard to who built it. It is a *public benefit*. The commissioners of highways have laid their roads from each town to the center of this bridge, and always used this bridge in connection with and as forming a *part* of the public highway. They are bound to keep it in repair, as much and to the same extent as though they had originally built it. The statutes of our state do not stop to inquire, or allow the commissioners to inquire, when a bridge used by the public for travel is swept away by floods, whether that bridge was originally constructed by the public officers, or whether there was not some technical defect in laying the road, by which they may escape liability. If it is a *public bridge, used as such* by the public, and no individual bound to repair, the liability of the officers to repair it is fixed. By our statutes it is provided (2 R. S. 381, 5th ed.,) "The commissioners of highways in the several towns shall have the care and superintendence of the *highways and bridges* therein, and it shall be their duty to give directions for the repairing of the roads and *bridges* within their respective towns, and to cause

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the highways and bridges which are or may be erected over streams *intersecting* highways, to be kept in repair."

If this bridge *intersects* a highway, and is used as a part of the public highway, it matters not by whom it was erected, the town officers are bound to keep it in repair. (*The King v. The Inhabitants of the West Riding of Yorkshire*, 2 East, 342, 347, &c. *Heacock v. Sherman*, 14 Wend. 59, citing 2 East, 342, *supra*. *Dygert v. Schenck*, 23 Wend. 445.)

II. Is *legislative authority* necessary, in this case, to authorize the erection of this bridge across this stream? We maintain it is not. There are three cases when legislative authority is necessary to erect a bridge over a stream. 1st. *Where the stream is navigable*. This is not. 2d. *Where the state owns the bed of the stream*, and 3d. *Where the right to take toll is denied*. And where the state owns the bed of the stream, no person has a right to use it, without its consent; but at the same time no person has a right to object, except the officers of the state. (*The Fort Plain Bridge Company v. Smith*, 30 N. Y. Rep. 44.) Now, admitting this Seneca river to be a navigable river, (which it is not, as the referee finds,) and a highway, what are the rights of the parties in relation to it? Have they a right to erect a public bridge to cross this river, if they can do so without obstructing it, or depriving the state or the public of its legal occupancy of this river? We maintain they have. (*Palmer v. Mulligan*, 3 Caines' R. 313.) This bridge was useful to the public, and had been *dedicated* to their use, and they are bound to repair (*Angell on Highways and Bridges*, § 104.)

E. DARWIN SMITH, J. The plaintiffs ask for an injunction against the defendants, who are commissioners of highways of the towns of Mentz and Conquest, in the county of Cayuga, restraining them, as such commissioners, from erecting or rebuilding a bridge across the Genesee river, which separates the said towns. The complaint alleges that a previous bridge

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had been erected, some twenty years since, in the same place, and kept up until it was carried away by a freshet, in 1865, and alleges that such bridge was erected without any authority from the legislature; that said river is a public navigable river; that the state owns the bed of the stream, and that the erection or rebuilding of the proposed bridge is not authorized by any legislative act, or in any way allowed by the state authorities. The complaint further alleges, that the Seneca river is about thirty miles in length, and is of an average width of about thirty-five rods, and of an average depth of about eleven feet, and has navigable communications from Lake Ontario to Schenectady, and runs through a thickly settled country and near a number of villages; that its banks are lined with large quantities of timber; and that the state has expended large sums of money, from time to time, in dredging its channel and in improving its navigability. The complaint further alleges, that said bridge, if constructed, will be a nuisance and a purpresture, in fact and in law, as well as a violation of the act of the legislature passed April 2d, 1813, declaring said river to be a public highway, and making it a misdemeanor to obstruct it by any erections or works in its bed or on its banks; and it further alleges, that said bridge will necessarily dam up and obstruct the navigation of said river, and hinder and delay, if not entirely obstruct, the plaintiffs in the exercise of their rights to freely navigate said river, and would also necessarily amount to an usurpation of a franchise which can only be conferred by the legislature.

The answer of the defendant denies substantially most, if not all of the essential facts stated in the complaint. It denies that the Seneca river is a navigable river; denies that the state owns the bed of the stream; denies that the proposed bridge will be any obstruction to said river or its navigation; and denies that it will be a nuisance or purpresture; and insists that the defendants have a lawful right as commissioners of highways to lay out a highway, and erect a bridge across said river.

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The defendants annex to their answer the report of C. C. Dwight, Esq. a referee in proceedings in this court relative to said bridge, under the act, chapter 639, passed April 16, 1857, in which the said referee finds and reports that said river was declared a public highway by act of the legislature in 1813, and in the early settlement of the country was occasionally navigated in seasons of high water by rafts and boats of small size ; but that it had not been navigated for many years, and is not now a navigable stream. This report, I presume, states the truth substantially in respect to this river, and, connected with the defendants' answer, substantially denies and disproves the equity of the complaint.

It appears from this report that there are already erected and in use twelve bridges across said river, at an average distance of about three miles from each other, throughout its entire length. I cannot see, therefore, why or how the bridge which the defendants propose to construct across said river, will particularly add to the obstruction already existing to its navigation.

Upon these facts, if this report was properly before me and had any judicial force in this proceeding, I should be inclined to deny the injunction entirely, upon the ground that the equity of the bill was denied ; but I think I cannot give any force to this report, as against the state, and I cannot overlook the fact that the legislature has asserted for the state the right to control said river, and has expressly declared it to be a public highway, by a public act, and that the bridges aforesaid, erected over said river, have been so erected upon leave or license from the state.

The state has, therefore, the unquestionable right to control the use of the river and prevent the erection or creation of any bridges or dams, or other works which will obstruct the free use of the same as a public highway.

Whatever rights the public have in this river, the authorities of the state were bound to protect, and this suit is properly instituted for that purpose. But the public right in this

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river, upon the assumption that it is not navigable in fact, is to be regarded simply as that of passage, as in a highway, as was said by this court in *Ex parte Jennings*, (6 Cowen, 537,) in reference to Chittenango river, "is one of passage, and nothing more, as in a common highway. It is a mere *easement*, and the proprietor of the land on the banks has a right to use the land and water of the river in any way not inconsistent with the easement. If he makes any erection rendering the passage of boats inconvenient or unsafe, he is guilty of a nuisance, and this is the only restriction which the law imposes upon him."

By declaring a stream a highway, as in this case, and as has been done with most of the streams of this state, which could, at any time and in any stage of the water, be navigated with rafts, floats, or small boats, the state does not acquire any title to the bed of the stream, or any higher or other right than it possesses in or over ordinary highways upon the land. But in respect to all fresh water streams which are navigable in fact, like the Niagara, the St. Lawrence, the Genesee, and Oswego below the falls; in those rivers the rights of the public are very different. Such streams are public, and belong to the state, as much so, doubtless, as the Hudson where the tide ebbs and flows, and as much so as the great lakes in the interior of the state. But this doctrine cannot, in my opinion, have any further extension. The rule of the common law in respect to highways and fresh water streams not navigable in fact, is too firmly established in this state to be changed or uprooted, except by a constitutional amendment, declaring that the provision in the constitution of 1777, which declares that "such parts of the common law of England and the statute law as did together form the law of the colony on the 19th day of April, 1775, shall continue the law of this state," be repealed, or shall not be construed to apply to water courses and highways.

Rivers navigable in fact, in all countries, belong to the public. This is so by the common law, by the civil law, and by the

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French code. Such streams, in the nature of things, are incapable of private appropriation, or if otherwise, any and every private appropriation of them is utterly inadmissible. But the rule does not apply where the reason ceases, and where the public interest on the contrary requires that private property should exist, and private rights be allowed, recognized and maintained for the public good. There is no reason, in fact, why the state should own the bed of the small streams utterly unnavigable, except in a time of high water, and then only with rafts and logs, and small flat boats; but sound reason and the public interest is all the other way.

The state doubtless may retain the bed of streams when it has the title, and by grant or patent in express terms has bounded the grantee by the shore as it did, or is claimed to have done, with the Mohawk river. In such case, as the primary source of title, it grants what it pleases, and conveys no more. In *The People v. The Canal Appraisers*, (33 N. Y. Rep. 461,) it has been recently held that the state owns the bed of the Mohawk river. The same view was taken in *The Canal Appraisers v. The People ex rel. Tibbits*, (17 Wend. 571,) in respect to this Mohawk river. In that case Judge Beardsley says, p. 608: "That the patent did not include the bed of the river, or the islands." He said that "the evidence most conclusively establishes that not only the colonial government but the state authorities have considered the bed of the Mohawk as belonging to the public."

If, therefore, the state owns the bed of the Seneca river, as is asserted in the complaint in this case, the law of those cases applies to it, and no one can lawfully construct a bridge over it without the consent of the legislature. But if the right of the state in this river, or its right to control it, depend entirely upon the simple assertion by the legislature that it is a public highway, then the defendants, I think, are entitled to lay out a highway and build a bridge across the said river, unless they proposed to take toll, which would be a franchise that must be granted by the legislature. It is not

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alleged that this is proposed or intended. If it be a navigable river in fact, they could not lawfully build such bridge without leave of the legislature, or if the state owns the bed. This is asserted in the case of *The Fort Plain Bridge Co. v. Smith*, (30 *N. Y. Rep.* 63,) and is undoubtedly the law of this state.

In many cases the legislature has granted the privilege to construct dams in, and to erect bridges over streams declared like this river to be public highways. This saves such erections from indictment and abatement as public nuisances ; but is not otherwise necessary or of any importance. The numerous bridges erected by the local authorities over such streams, in all parts of the state, have not, I think, generally been authorized by special acts of the legislature. Bridges in most cases, I think, have been erected whenever the public convenience or necessity has required them, without doubt or question in respect to their lawfulness. But all such erections must undoubtedly be made at the peril of the parties making them.

The state has, I think, the undoubted right to forbid such erections, and to abate them when made, if they will or do in any degree obstruct the navigation of the streams over which they are erected.

The state government in this particular is the guardian of the rights of each and every citizen, which rights consist in an absolute and unqualified privilege without let or hindrance at all times freely to navigate with boats, rafts, logs or any other mode of water conveyance any and every of the streams in the state that is at any season of the year, or at any stage of water therein capable of navigation, and particularly so if the legislature has by special act declared such stream a public highway.

While therefore I think the defendants cannot be permanently restrained from erecting the proposed bridge as a free bridge, provided it can be constructed in such a manner as not to interfere with the free navigation of said river, if it

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shall turn out upon the trial that the said river is not navigable in fact, and that the state does not own the bed of the stream ; yet I am inclined to think upon the whole that inasmuch as it is asserted on the part of the people that this is a wide stream, of the width of thirty-five rods, and of the average depth of eleven feet, and it is also asserted that the state owns the bed of the stream ; and it also appears that the bridges heretofore erected across it have been constructed under leave or authority from the legislature ; that I ought in behalf of the public interest rather to assume that the state has the rights it claims till the truth can be otherwise established, and restrain the erection of the proposed bridge till the hearing. And it is so ordered, with costs to abide the event.

[MONROE SPECIAL TERM, JUNE 24, 1867. *K. Darwin Smith*, Justice.]



## **An Memoriam.**

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**HON. WILLIAM W. SCRUGHAM,**

**J**USTICE of the Supreme Court for the Second Judicial District of the State of New York, died, after a very brief illness, in the last year of the term of office for which he was elected, at his residence, Yonkers, Westchester county, on the 9th day of July, A. D. 1867, in the forty-eighth year of his age.

A meeting of the Bar of the Second Judicial District was held at the court house in the city of Brooklyn, on the 12th day of July, 1867. Hon. JOHN A. LOTT, presiding judge of the district, was called to the chair, and SIDNEY V. LOWELL, Esq. was appointed secretary.

HON. NATHAN B. MORSE, ex-judge of the Supreme Court, then addressed the meeting. He said: "Mr. Chairman: It having been my lot to become earlier acquainted with our departed friend and brother, as I presume, than any member of the bar of the county of Kings, I cannot allow the present melancholy occasion to pass without offering my humble tribute to his memory.

It is now twenty years since official business first called me to the county of Westchester, where I became acquainted with Judge Scrugham, then recently elected to the important office of district attorney of that wealthy and important county. From that time onward I had frequent opportunities to observe his public character, and to see and feel his private and his social worth. As the prosecuting officer of the people of the state for his county, though then a young man, in whom more ardor than discretion might have been excused, yet he unconsciously manifested that high sense of public duty which recognizes that the people, in their sovereignty, have the same interest in "the acquittal of the innocent as in the conviction of the guilty."

In other official relations, before he was called by the people of this district to the bench, I had opportunities to know how pure was his honor, how upright his integrity, how sound his judgment. After his elevation to the bench, you sir, had a more perfect opportunity, and my brethren of the bar had equal or better opportunity than myself, to observe his public performance of duty. And I believe you from your vantage ground, with us of the bar from our lower level, will concur in saying that our departed friend and brother possessed that integrity of purpose, that purity of moral perception and that soundness of judgment, combined with commendable industry, which fitted him for all the various relations of a private advocate, a public prosecutor and a judge.

One word as to the social qualities of Judge Scrugham. I remember no one more genial—more delightful in anecdote—more instructive in reminiscence, whether from the printed page, or the far more varied page of human experience and observation. The memories and griefs of his life's partner, and their offspring, are all too sacred for aught but silent, painful sympathy.

The Hon. Nathan B. Morse, the Hon. Jesse C. Smith and Alden J. Spooner, Esq., the committee appointed by the chair, then presented the following resolutions:

*Resolved*, That in the decease of William W. Scrugham, Justice of the Supreme Court of the Second Judicial District, and member of the Court of Appeals at the time of his death, the Judiciary and Bar of the State have sustained a loss which it is difficult to repair; that he was distinguished as well for the moral elements that lie at the base of all sound judgment, as well as for the learning and attainments which should characterize a judge; that, also, in the best elements of manhood, in sweetness of temper and amenity of manner, he was deservedly beloved by all who knew him.

*Resolved*, That the members of the Bar attend his funeral, and that the Court be requested to enter these resolutions on its minutes, and that a copy thereof be forwarded to his family.

In offering the resolutions, Mr. SPOONER said: "Sir: It is not always that I feel impelled to take part in funeral solemnities, and rarely do so when men merely great in station have passed away. But I did feel impelled to attend this meeting, by that tie of sympathy with the deceased, which always bound me to him as one of the elect of men, in the best elements of manhood. My professional intercourse with him has been less than that of almost any of the older practitioners at the Bar; but from the evening of my introduction to him, when he first came amongst us, I saw that he was a man to be loved, and that in his person he would

show down from the bench the manners and virtues which render the judgment seat not only respected and honored, but graceful and attractive. He has well acquitted himself, and passed away, the youngest of a group of judges, and in mid career of advancing usefulness. His nature was of unvarying kindness, and he had, by the gift of nature, that patience and forbearance which men often vainly seek to acquire by years of discipline. He was growing and expanding by that severe yet admirable cultivation which, in his high place, so tasks the reason and exercises all the faculties.

I hardly know why it is that standing here with my brethren and looking down into his open grave, I feel myself so moved by his loss. I could not avoid the same feeling when the lamented William Kent, so like him in his youthful traits, and in his cordial sympathy with all true manhood, passed to a comparatively early grave. The great poet of universal mind and matter has somewhere said, "one touch of nature makes the whole world kin." We do feel akin to a good man by the slightest touch of social contact and sympathetic fellowship. It is a sinister and questionable sentiment this of the same master intellect: "The evil that men do lives after them; the good is oft interred with their bones."

Thank God, the good survives. It is charitable to forget the errors, the frailties, the infirmities of men, and in burying the poor body in the dust, to forget it with its infirmities. But it is otherwise with the good. Who of us, while life shall last, can fail to recall to pleasurable remembrance the amiable traits, the generous qualities, the noble virtues of the deceased; and more lasting than the records of his Court is the record of a career so fair and honorable.

How inscrutable is the problem of death? We had supposed, in our ideas of the course of nature, that the youngest of the judges would have survived his fellows. But death solves his own problem:

"Leaves have their time to fall,  
And flowers to wither at the north wind's breath,  
And stars to set; but all—  
Thou hast all seasons for thine own, oh death!"

Young as Judge Scrugham was, he had illustrated his multiform ability in various modes of usefulness—in the church, in military affairs, in county offices, in the progress of the village of his residence. He was of the class of men to leave the world better than he found it, and had he survived, might justly have aspired to other stations of eminent usefulness.

Although, Mr. Chairman, he came almost a stranger amongst us, as Mr. Murphy has said in his well expressed letter, yet how rapidly his virtues and pleasant manners made him known to the people of this city and island, without any of the vulgar or obtrusive arts of popularity. His fairness, frankness and affluent courtesy, won upon the people, and he will not be more sincerely mourned in the neighborhood of his home than among the kind hearted citizens of Queens and Suffolk.

Our tears will descend this day upon his face, ere the coffin lid is closed, with those of the dear family he has left behind. In the green turf above him will nestle and grow, with the spring flowers, memories more beautiful and fragrant, for his wife, his children and his children's children.

I should apologize to the Bar for having said so much. My feelings towards the deceased would not allow me to say less."

Mr. SIDNEY V. LOWELL next addressed the meeting. He said: "Although reluctant to rise on this occasion before so many older brethren of the profession, I feel it my duty, as one who was a personal friend of Judge Scrugham in his lifetime, to bear to his memory such testimony as my overburdened heart will allow, now that he is no longer with us in courteous presence to speak from the bench; and in the few remarks that I shall make, I speak particularly on behalf of the younger members of the Bar. It would ill become me to speak in any terms of comparison, of the distinguished abilities of the man who was the choice of the people of this district, for a position of such honorable exaltation as that of a Justice of the Supreme Court of the State. Yet all who have witnessed his patient mastery of the most voluminous testimony, in the important cases brought before the many circuits at which he presided, will bear me witness when I say that no judge in this state better understood how to unravel a tangled web of testimony and present a clear statement to the jury, of the facts as they appeared from the evidence, than the deceased. That no one ever avoided bringing on a trial at a circuit at which he was to preside, because he feared the ability of the judge to master the testimony and appreciate its effect, or doubted the patient skill with which he would follow the testimony with almost the same interest as the counsel, and his nice discrimination of all the equities of the case, which he rarely failed to discover, and would fearlessly point out, to the uttermost extent of his duty. It was this high sense of equity in the departed judge, his hatred of all trick and pretense, that made every lawyer feel when he brought a case on for trial before Judge Scrugham, that the right would be sure to be made apparent, and feel if he was

unequal in power to his opponent—that if his case had any strength, it was enough—that if the equities of the case were with him, in despite of all polished argument and skill, Judge Scrugham would be with him too. And when sitting in *banc*, how pleasant has it always been to see the unvarying attention with which the judge would follow the counsel through their dullness of argument, on the most tedious case, with that quick and clear eye, which showed that his thoughts really followed the line of argument, and his unruffled and even countenance, rarely showing any hesitation as to the soundness or unsoundness of the propositions advanced, never wearing the dreamy stare of inattention, or the puzzled look of misapprehension. But, sir, my main desire in presenting these few remarks, was to express the gratitude which I know the young bar of the second district felt towards the lamented judge, for the kindness with which all his actions towards them was marked. Courteous to all members of the bar alike, he always refrained, under the most aggravating circumstances, from any remarks calculated to hurt the feelings of the humblest member of the profession, and was of too good a heart to enjoy the display of his knowledge at the expense of the youngest practitioner. But he was always ready to quietly advise some more efficient remedy not known to the inexperienced applicant. His kindness to the young bar will ever be remembered by them; and when they are no longer young, but become in time the seniors in the profession, they will tell their students of the times of the learned judge, kind friend and courteous gentleman, whose decisions a strict analysis will find to have been rarely reversed, and whose person was beloved by all who knew him; in whose blood was treasured the noblest attributes of his good old Dutch ancestry, the founders of our commonwealth, of whose race he was at once so modest and distinguished a representative. May we keep the memory of the departed so fresh and green that it shall be a bright example to all who shall endeavor to fill the place of dignity that he occupied. Thus we may inspire others to strive to fill with honor like his the high office; but alas, who can fill for us the place his sudden death has left vacant in our hearts.”

HON. ROBERT S. HART, ex-judge, of Westchester county, then addressed the meeting, as follows: “Mr. Chairman: Arriving here this morning to transact business in the special term, I learned, an hour since, of this meeting of the Bar. Coming from Westchester, where Judge Scrugham resided, I feel that my brethren might consider me remiss, should the voice of that county be hushed on an occasion in which she has so mournful an interest.

Gentlemen who have addressed us have spoken of the youthful appearance of the deceased, and the little they knew of him, in this county, previous to his coming to the bench. I have known Judge Scrugham for over a quarter of a century. I knew him in early youth as a student at law, and have observed him in his gradual progress, until he finally reached the position of a seat in the highest tribunal in the state of New York. He resided at first in White Plains, where he studied his profession, and afterwards removed to Yonkers, and that place gives evidence now of his character and habits. In my opinion much of its growth and success is attributable to him. He was several times elected supervisor of that town, and his services were useful not only to it, but throughout the whole county. He performed the duties of district attorney in Westchester county with ability and integrity. He never hunted down the accused merely for the sake of a triumph. When he supposed a prisoner innocent, or believed injustice would be wrought by sustaining an indictment, he would not refrain from asking the court for a *not pros.* In that office he was agreeable to the bar and gave satisfaction to the public. For some years he was a colonel in the militia, and was a brigadier general at the time he was chosen a justice of the Supreme Court. He had a genial disposition, a remarkable fund of anecdote, with ready wit, and great conversational ability. To the bench he brought a manly sense, a courteous manner and a quality for a judge which transcended the mere learning of the books, that is, a keen appreciation of right and a determination to do it. He held no circuit court or special term in Westchester at which I was not present. His promptitude and industry, his elocution, his integrity, compelled the general approbation. His popularity extended to all classes, and throughout the entire county. Whenever he made a decision disagreeable to a personal friend, he did it firmly, boldly, but not unkindly. No matter who was the advocate, or what was the case, he tried to do what was right.

But however rare our virtues, or distinguished our station, we must descend to the tomb. He sat in the highest court of this state; but he has laid down his great office. He has gone. An illness so brief, a death so sudden, are startling. How frail we are. We seem to stand in the very ante-chamber of eternity. Let his departure give us a pause. So solemn an event will lead to reflections which touch the great future. A tribunal greater than any of this earth is awaiting us. Let us be ready."

Hon. JOHN A. LOTT, said: "As a colleague of the late Judge Scrugham on the bench of the Supreme Court, I cannot let this opportunity pass without offering my testimony, and I concur in all that is expressed in

these resolutions. I, as a member of the bar, and a judge, became acquainted with him before he was elected to the bench, as a prominent member of the Westchester bar. He was an honorable member of that bar, and one whose example is worthy of you to follow. He was called to the bench by a very large vote; and in that capacity I can testify, as one of his colleagues, to his readiness to hear the arguments of counsel, to give them proper respect, to weigh well what had been said, and to give it full effect and weight. He was diligent, and always ready. He came prepared to consent to or dissent from the decisions made at the terms of the court, from time to time. While it is the practice of the court in this district to assign certain cases to particular judges to be examined, it still is considered the duty of each to examine all the cases heard, so that when a decision comes to be given, it is not merely the opinion of the judge writing it, but the opinion of all the judges of the court. Judge Scrugham always gave full and proper attention to the cases that had been argued, and when he joined in the decision made, it was with the full conviction that the decision was right. He did not merely assent to the judgment pronounced because it was the judgment of his colleagues, but because he believed in the propriety and justice of the decision. He had no desire for show, and never desired to make any display in the writing of the opinion for publication in the reports of the state; but his desire was to do justice; and I can bear testimony to that which always characterizes a judge of character—*he was an upright judge*. He never swerved to the right or the left for any consideration, be it social feelings or party consideration, or any thing that was out of the case or the merits of the case; but strict integrity, I am ready to answer for, was the controlling motive in his decisions. He certainly is worthy of the record—“He was an upright judge.”

The resolutions were then submitted to a vote, and passed unanimously. Justice Lott ordered them to be entered upon the minutes of the court, and the meeting then adjourned.

A meeting of the Bar of the city of New York was also held, on the 12th day of August, 1867, in the Supreme Court (circuit) room, to take appropriate action in reference to the decease of Judge Scrugham. The meeting was called to order by ex-Judge Bonney, who nominated Hon. H. E. Davies, chief judge of the Court of Appeals, as president, and Judges D. P. Ingraham, Geo. G. Barnard, and Surrogate Gideon J. Tucker as vice presidents. Messrs. Wm. Fullerton and Livingston K.

Miller were appointed secretaries. A committee of five, consisting of Samuel E. Lyon, Judge Bonney, John E. Burrill, Isaiah T. Williams and Elias J. Beach, were appointed to prepare resolutions expressive of the sense of the meeting. The committee then reported the following:

*Resolved*, That the death of the Hon. W. W. Scrugham, in the prime of life and in the ripening season of his judicial usefulness, is cause for grief to all who knew him, and to his brethren of the bench, to the profession of which he was a member, and to the state, a public calamity. Very clear and quick in his perception of the right, and steadfast in its maintenance, conscientious in examination, and guided to his conclusions by the light of a discriminating intellect, he was winning a distinguished and honored place in the judiciary of the state, when his sudden withdrawal from his work has caused us painfully, but submissively, to realize how mysterious and inscrutable are the ways of the All Wise Dispenser of human events. A true and warm hearted gentleman, he won the affections of all who knew him well, while he secured the respectful regard of all who were brought into official relations with him. We tender to his family, whose loss is unspeakable—to his brethren of the bench and bar, to whom he offered the example of a good and upright judge, brightened by the genial warmth of a temper that carried its sunshine even into the field of his labors—our sincere condolence, that his clear head and warm heart are lost to them forever.

*Resolved*, That a copy of these resolutions be sent to his family, and that a copy be presented to the Court of Appeals at the next term thereof, with a request that the same be entered upon the minutes of that court.

Messrs. John E. Burrill, Isaiah T. Williams, Robert Goins and John N. Whiting then offered, in succession, some highly appropriate remarks, on the private character and professional reputation of the deceased gentleman, after which the resolutions were unanimously adopted.

# INDEX.

## A

### ACCOUNT STATED.

1. The plaintiff claimed to have left a draft with a bank for collection, on the 24th of July, 1856. His bank book was written up as early as August or September, 1856, and balances were struck and the vouchers delivered up to him repeatedly, afterwards, until 1859, when he drew out of the bank the balance remaining to his credit. In September, 1856, he knew, or with reasonable attention might have known, that the draft was not credited to him on the books of the bank; yet he omitted to bring the matter to the notice of the bank until the spring of 1862. *Held* that this was a *stated account*, not objected to within a reasonable time; so clearly so, that it was not, under the evidence, a question proper for the consideration of the jury, whether the delay was sufficiently accounted for. *Hutchinson v. The Market Bank of Troy*, 802
2. *Held*, also, that the judge properly refused to charge that under the circumstances the plaintiff was *absolutely* and *conclusively* bound by the stated account, and could not recover of the bank the amount of the draft. The true rule in such cases is that the stated account is conclusive upon the parties, unless the plaintiff is able to impeach it by showing affirmatively fraud or mistake. *ib*
3. A stated account never gives to a party claiming under it the benefit

of an absolute *estoppel*. In practical effect it gives to him little more than these two advantages: 1. When the question arises upon the pleadings, the court has, in some instances, in granting permission to amend or reply, some equitable control over the power of opening accounts; 2. When the question arises upon the trial, the party impeaching the account has the affirmative of the issue, and the burthen of proof. *Per ROEBUCK, J. ib*

### ACKNOWLEDGMENT OF DEEDS, &c.

*See* DEED, 8, 9.

### ACTION.

1. A right of action to recover damages for the fraudulent misapplication or conversion of property by an officer or agent of a banking association, is *assignable*, and an action can be maintained by the assignee. *The Grocers' National Bank v. Clark*, 26
2. Such a right of action is assignable when the wrong is committed against a banking association, equally as if the property of an individual was thus misapplied or converted. *ib*
3. The attribute of assignability is not confined to rights of action belonging to natural persons; it extends with equal effect to those belonging to artificial persons. *ib*

*See* AGREEMENT, 5.  
ATTACHMENT, 1.

*See* DESERTERS.TAXES AND TAXATION, 1.  
TENANTS IN COMMON, 2.

## ADMISSIONS.

*See* JUDGMENT, 5, 6.

PROMISSORY NOTES, 7, 8.

## AFFIDAVIT.

*See* ATTACHMENT, 2, 3.

LANDLORD AND TENANT, 3, 4.

## AGREEMENT.

1. On the 4th of November, 1864, the plaintiff, by a written contract called a sale note, sold to D. one hundred bales of cotton, quality even middling, at fifty-nine cents, "to arrive," for cash on delivery. On the 18th of December twenty-one bales of the cotton arrived, of which notice was given to S., the purchaser's agent, who selected nine of them as even middling, obtained possession of them, and sent them to the warehouse of the defendant, with directions to store the same, as the property of the Atlantic Delaine Company. Payment was claimed by the plaintiff to have been demanded, at the time the cotton was delivered to S., and refused. It was not pretended that the Atlantic Delaine Company paid, or parted with, any consideration for the cotton. But it appeared that the same was deposited with the defendant for the benefit of the company, in part fulfillment of a contract which D. had entered into with them, to deliver to them 200 bales of cotton on arrival. *Held* 1. That although the Atlantic Delaine Company received the nine bales in question under their contract with D. and credited him therewith, yet as they had paid nothing for the cotton, they could not be protected as bona fide purchasers, against the plaintiff's lien, unless the plaintiff was originally not entitled to, or waived payment on delivery. 2. That either vendor or vendee could have regarded the contract between them as an entire contract. The cotton was "to arrive;" and until the whole of it should arrive, the one was not

obliged to deliver, or the other to receive, any portion of it. 3. But that as D. the purchaser, did receive the nine bales, he was bound to pay for them, on delivery, unless the vendor waived this condition of the contract. 4. That a waiver could be effected either by express assent, or by acts, such as an unreasonable delay in demanding payment, or in not demanding it at all. 5. That the testimony upon the question of an express waiver being conflicting, it should have been left to the jury; and that the judge erred in taking it from them, and in refusing to admit evidence bearing upon that question. *Matthews v. Hobby*, 167

2. The law will not imply a promise to pay for board or services, as among members of the same family, and persons more or less intimately or remotely related, where they are living together as one household, and nothing else appears. *Wilcox v. Wilcox*, 827
3. By the terms of a contract between the parties, the plaintiff sold, and the defendants purchased, "two boat loads western mixed corn in B.'s stores, Clinton wharf, ex boats Spencer and Galt, at 89 cents per bush. of 56 lbs., in store No. 1, bins 3, 4 and 5." Six boat loads of corn of the same quality and description had been placed and mixed together, in those bins, previous to the sale, four of which had been sold. It was proved that it was customary, in selling by the boat load, to designate the boats from which the corn was received into the store, for the purpose of fixing the quantity; that corn from each boat was weighed when received, and mixed with other corn of the same quality, and the name of each boat, and the quantity it contained, was marked upon the bins; so that in selling a specific boat load, the quantity and quality only were represented, and not the identity of the corn brought by such boats. The sale was by sample, taken from these bins, and the bulk in the bins was inspected by the defendants' agents, compared with the samples, and found satisfactory. The bins 3, 4 and 5, when filled with the six boat loads, had burst, on one side, and about one hundred bushels of the corn had fallen into the pas-

sage way, whence it was removed, temporarily, to the front side of another bin, in the rear of which was some other corn; the two parcels being separated by a partition, and not coming in contact with each other. The same identical corn so removed was afterwards returned to the bins from which it had been taken. *Held* 1. That although the defendants purchased by sample from the bulk of corn in the bins, 3, 4 and 5, they had not purchased the identical corn taken into the bins from the boats Spencer and Galt. That the words "ex boats Spencer and Galt," were not necessarily, in the light of the evidence, a guaranty that the corn was taken from those boats. 2. That there being no means of determining from the face of the broker's bought and sold notes that these words indicated the quantity or quality of the corn, there was, in this respect, a latent ambiguity, and evidence was properly received in explanation. 3. That the judge was correct in refusing to charge that the defendants had purchased some particular boat load of corn, or that the contract did not mean the quantity and quality of corn brought by the particular boats. 4. That there being no proof that other corn was mixed with that sold, the testimony did not warrant the submission by the judge of the proposition that the defendants had purchased a specified bulk of corn in certain bins, and if other corn was mixed with it, that the plaintiff could not recover. 5. That an instruction to the jury that the defendants were bound to receive the corn if it were of the same quality and quantity with that contained in the boats Spencer and Galt, and that it was not material that it was not in the bins 3, 4 and 5 at the time of the contract, was not to be understood as an instruction that upon a sale of a particular article, another, of the same quality and quantity, must be received in fulfillment of the contract, if tendered for that purpose. That such a rule could not be sustained, although it might be impossible to appreciate, in damages, the actual difference. 6. That the plaintiff having tendered the corn, by offering to transfer the storage receipt therefor, there was no ground for the pretense that the offer to deliver was not of the

same corn which was sold, as understood and intended by both parties.  
*Hay v. Leigh,* 898

4. By a written agreement, dated November 29, 1862, the defendants agreed to sell to the plaintiff four hundred cords of white pine wood, to be delivered on or about the 1st of May, 1863, and that no part of the delivery should be later than November 1, 1863, the same to be paid for, cash on delivery. The plaintiff agreed to pay for two hundred cords at the rate of \$5.25 per cord, and for the other two hundred cords at \$5 per cord. About one hundred and fifty-five cords were delivered, under this contract, and payments made therefor to the amount of \$788, between August 1 and September 1, 1863, when the defendants refused to deliver any more. *Held* 1. That the contract was for the delivery of, and payment for, four hundred cords of wood as an entirety, half the quantity being at the higher, and half at the lower price. 2. That the contract was to the effect that the defendants would deliver, on or about May 1, and that no part of the delivery should be later than the 1st of November; the payment to be cash on delivery. 3. That the agreement was not for payment as the wood was delivered, but required the full performance of the delivery agreed on, before payment could be demanded. 4. That the contract gave the defendants the whole season, from May 1st to November 1st to deliver the wood; and if it was delivered within that time the plaintiff was bound to accept and pay for it. 5. That it was not the one half, or the other, that was to be paid for at the greatest price; but the prices named covered the whole quantity. 6. That the plaintiff committed no breach of his contract by refusing to pay any more than \$5 per cord, because the defendants were not in a condition to demand any thing; nor could such refusal be deemed a refusal to take any wood and pay for any part at the higher rate named in the contract. 7. That the judge erred in holding that the delivery of one hundred and fifty-five cords was too late to be applied on account of the two hundred cords which was to have been delivered on or about May

1st; and also in leaving it to the jury to say whether the delivery was in season, and if not, that the defendants were entitled to be allowed only at the rate of \$5 per cord. 8. That the plaintiff having accepted the one hundred and fifty-five cords as a delivery under the contract, the jury should have been instructed, in estimating the damages, to allow the defendants for one half of the wood at the larger price, and the remainder at the lower price. *Williams v. Sherman*, 402

5. E. agreed to sell and convey to the defendant a house and lot for the price of \$10,500, subject to the payment of a mortgage thereon for \$5000, which the defendant assumed as a part of the purchase money, and agreed to pay the residue, \$5500, in ready made clothing. E. was to convey the property free from all incumbrances, except the said mortgage. There being taxes, to the amount of \$278.24 which were a lien on the property, and E. being unable to furnish the money to pay said taxes, it was stipulated by a written agreement between the parties that the defendant should retain \$650 worth of the clothing, at the invoice price, upon the condition that if E. should pay the taxes within one month from that date, the defendant should deliver the said clothing to E.; but if not paid, within the time, then the defendant should have a right to pay such taxes, and appropriate the clothing so retained, to his own use, as his indemnity and remuneration for such payment, without accountability therefor. Clothing to the amount of \$650 was accordingly selected by the defendant and retained for the above purpose, the balance of the clothing delivered to E., and the conveyance of the property closed. E. failing to pay the taxes, within the time, the defendant paid them, and appropriated the clothing to his own use, claiming that the same was forfeited. In an action brought against him, by the assignee of E. for the conversion: *Held* 1. That the facts did not present the case of a *pledge*; it being of the essence of such a contract that the thing should be delivered as a security for some *debt* or *engagement*; and that it not appearing that the taxes were assessed

against E., or that she was in any manner *liable for the payment thereof*, there was no engagement of E. to which the clothing could attach as a pledge. 2. That the agreement should be regarded as a modification of the original contract of sale, whereby the defendant agreed to take the real estate subject to the taxes, and pay therefor \$650 less, in clothing, and gave to E. the option or privilege of acquiring the benefit of the original bargain, by paying the taxes within one month. 3. That an action would not lie against the defendant, for the conversion of the goods; and that the plaintiff was therefore properly nonsuited. *Hale v. Hays*, 574

6. Under a contract to deliver petroleum oil, within a specified time, not to the purchaser personally, or at his place of business, but "*to lighter*," a tender on the evening of the last day, is sufficient. It will be inferred that the parties intended, when they entered into the contract, that the buyer should send a lighter to receive the oil; and if he neglects to furnish, or wilfully withholds, the means requisite to enable the seller to deliver the oil within the contract time, he is in default. *Ketchum v. Huller*, 596
7. Under such circumstances, the tender need not be made early enough within the contract time to enable the buyer to examine and accept the oil prior to the expiration of the time specified in the contract. *ib*
8. A proposition, made by one party, by letter, to another party at a distance, containing a specific offer, which is unconditionally accepted by the latter, will constitute a valid contract between them. *Myers v. Smith*, 614
9. A bargain thus evidenced is to be deemed closed when nothing mutual between the parties remains to be done to give either a right to have it carried into effect. *ib*
10. From the moment when the minds of the contracting parties meet, signified by overt act, the contract is obligatory. And whatever amounts to the manifestation of a formal determination to accept an offer of a

contract of sale, communicated to the party making the offer, is an acceptance which will bind the bargain. *ib*

11. But where the letters of a person proposing to purchase indicate that an interval is meant to be provided for, during which the property is to be held by the owner until the former can examine it, and determine in what manner it shall be disposed of; and the conduct of the purchaser lends confirmation to that conclusion—as by his going to the vendor's place of business without funds to pay for the property, and without any arrangement to procure funds for that purpose, and without providing any means of taking away the property—this will not be deemed an executed and completed contract, mutual in its obligations, but merely a negotiation inchoate and unperfected. *ib*

12. An acceptance of an offer made by letter must be in the words of, or must be entirely accordant with, the terms and conditions of the offer, to bind the party who makes the proposition. *ib*

13. Thus, where an offer was to sell malt "delivered" on the boat at W., and the acceptance was of the malt "deliverable" on boat; *Held* that this was a manifest variance from the terms of the offer. *ib*

14. Though an offer and demand of performance may be necessary to atone for an apparent laches, and to put the other party in default, yet they assume the existence of a contract of which the party offering and demanding has a right to require the performance, and they have no effect where there is no existing and obligatory contract to which they may be referred, and to which they are a necessary supplement. *ib*

*See* GIFT, 8.

REVENUE STAMPS, 4.  
VENDOR AND PURCHASER, 1, 2.

# AMENDMENT.

*See* EVIDENCE, 6.  
JUSTICES OF THE PEACE.

*See* MORTGAGE, 5, 6.  
RELEASE.

# ANSWER.

*See* USURY.

# APPEAL.

1. The Supreme Court, on appeal, can review a judgment of a county court rendered on appeal from a justice's court, on exceptions that are made a part of the record, though the exceptions have been passed upon in the county court, on a motion made in that court for a new trial. *Bliss v. Schaub*. 564

2. An order denying a motion for a commitment for not obeying a mandamus is appealable. *Pouget v. Phelps*, 566

3. Where the alleged contempt is to be made out from contradictory affidavits, then the decision of the judge at chambers is conclusive; and if he is not satisfied as to the intent of the parties charged, the court, on appeal, would not reverse his decision. But where the contempt is not denied, or where an evasive excuse is offered and the judge, notwithstanding, refuses to order a commitment, such an order may be appealed from, and relief may be had in the general term. *ib*

*See* PRACTICE, 2.

REVENUE STAMPS, 2, 3.

# APPEARANCE.

Where a defendant applies for, and obtains, an order from the court giving him time to answer, and serves that order, with a notice signed by an attorney, as "attorney for the defendant," this is doing an act in the progress of the cause, and submitting to the jurisdiction of the court; which is equivalent to an appearance. *Ayres v. The Western Railroad Corporation*, 182

# ASSESSMENT AND ASSESSORS.

*See* TAXES AND TAXATION.

## ASSIGNMENT.

The right of action for money lost in betting is assignable. *McDougall v. Walling*, 364

See ACTION.

## ATTACHMENT.

1. An action against a common carrier, to recover damages for the loss by negligence of goods entrusted to his care, is not an action arising on contract, within the meaning of section 227 of the Code of Procedure, authorizing the issuing of an attachment "in an action arising on contract for the recovery of money only." *The Atlantic Mutual Insurance Company v. McLeon*, 27

2. The affidavit upon which an application to a justice of the peace for an attachment is founded must specify the sum in which the debtor is indebted, "over and above all discounts," as required by the statute. *Kelly v. Archer*, 68

3. Where the application is made upon the ground that the defendant has departed from the county where he last resided, with intent to defraud his creditors, the affidavit must state that intent. It is not enough to state therein that the defendant left with the intent not to return, or secretly and without the knowledge of his family. 46

4. The statute requires that a bond shall be executed and delivered to the justice before an attachment is issued; and until this is done, no attachment can properly issue. 46

5. No other agreement will supply the place of the bond required by the statute; and if there is no bond, the justice will not acquire jurisdiction. 46

6. If the condition be not such as the statute requires, the bond will be void. No other condition will answer; and that being a jurisdictional and substantial defect, it cannot be obviated. 46

7. An undertaking by the plaintiff, not executed to the defendant, to the

effect that if the defendant shall recover judgment, the plaintiff will pay all costs which may be awarded, and all damages which the defendant may sustain by reason of the attachment, is not a compliance with the statute. 46

8. The allegation that the defendant has departed from the county, with an intent to defraud his creditors, is an essential part of the case; and if it is not sustained by proof, the judgment will be void. 46

## B

## BAILEE.

A person in the possession of, and using, property as a bailee for hire, may recover damages for an injury thereto. *Bliss v. Schaub*, 389.

## BANKING ASSOCIATIONS.

In an action by a banking association organized under the act of congress, the defendant has a right to deny, in his answer, the legal existence of the plaintiff as a corporation; but an issue of that kind should not be tried by affidavits, on motion. *The National Bank of the Metropolis v. Orcutt*, 256

See ACTION, 1, 2.

## BANK STOCK.

See *Leitch v. Wells*, 637.

## BETTING.

The right of action for money lost in betting is assignable. *McDougall v. Walling*, 364

See COUNTER-CLAIM, 6.

## BILLS OF EXCHANGE.

1. The defendants received from the plaintiffs, for collection, a draft drawn by a bank upon the Ohio Life and Trust Company, and on present-

ing the same to the company, at its office in New York, they received in payment the check of the trust company upon a bank, and surrendered the draft. The defendants neglected to present the check of the trust company on the day they received it, and before banking hours of the next business day the trust company suspended payment, and its check was dishonored, on presentation. *Held* that the defendants having surrendered the draft, assumed the responsibility of taking the check of the drawee in payment. And that the existence of a custom, in the city of New York, among business men, to take the checks of the trust company without certification, in the same manner as bank checks, afforded no defense to an action by the plaintiffs to recover the amount of the draft. *Nunnenmaker v. Lanier*, 234

2. It inevitably follows from the act of congress commonly called the legal tender act, and from the decisions of the Court of Appeals of this state affirming the constitutionality of that act, that a bill of exchange payable "in specie or its equivalent," may be paid in legal tender notes, commonly called greenbacks. *Jones v. Smith*, 552

#### BOND.

*See* EXECUTORS AND ADMINISTRATORS.  
SHIPS AND VESSELS, 5, 6, 7, 8.

#### BOTTOMRY BOND.

*See* SHIPS AND VESSELS.

#### BRIDGES.

*See* RIVERS.

#### BROKERS.

1. The plaintiffs employed the defendants, who were brokers, to sell gold for them to the amount of \$30,000. They had not the gold to deliver, but it was intended to sell it short, in expectation of a fall. The defendants made the sale, and notified the plaintiffs. A deposit was made with them,

in the check of the plaintiffs' firm, for \$15,700, which the plaintiffs alleged was to be placed to their credit. Subsequently, the defendants gave notice to the plaintiffs that they would require some money the next day; and \$4000 was paid them. The defendants afterwards gave notice that unless they had a further margin, they should close out the gold in an hour. They then bought the gold for the plaintiffs, at a large loss. The plaintiffs denied their right to do so, and repudiated the transaction, and brought an action to recover back the moneys deposited. *Held* that the defendants were not bound to continue liable for the plaintiffs' contracts for an indefinite period. That if the margin was deficient they might have closed the transaction without notice, by purchasing the gold on the plaintiffs' account; but if they were unwilling to continue liable even with the margin, they could give notice to that effect, and then, if after a reasonable notice, the plaintiffs did not comply, they could act in the same way. *Stirling v. Jaudon*, 459

2. In such a transaction, no notice is necessary of the time and place at which the brokers will make the purchase. That rule only applies to a pledge of stocks or other securities for the payment of a debt. ✓
3. On the 5th of October, 1864, the plaintiff gave to the defendants, who were stock brokers, a written order to sell for his account one hundred Michigan Southern, at sixty-one three eighths. The plaintiff had no stock in the hands of the defendants, nor did he ever supply them with any, to enable them to execute the proposed sale. Both parties contemplated a speculative transaction, called a "short sale." The defendants did not make such a sale, but sold the stock, and, the next day, delivered the stock sold, which they had borrowed from another customer. On the 15th of November, 1864, the defendants bought one hundred shares, Michigan Southern, for the account of the plaintiff, at seventy-three, without any specific orders to do so. *Held* that the plaintiff was not liable for the difference in the price of the stock as shown by the sale on the 5th of October, and the ✓

purchase on the 15th of November.  
*Knott v. Fish*, 598

their agents or employees. *Stadman v. The Western Transportation Co.* 97

### BROOKLYN, (CITY OF.)

1. Even assuming that it would be competent and lawful for the city of Brooklyn to take lands for a public street or highway, on the payment of a nominal sum therefor, upon the ground that the original proprietors had dedicated the same to that purpose, it does not follow that they can be appropriated, and that the title thereto can become vested in the city, as "public places," under the act of April 17, 1866, "for the improvement of the Brooklyn Heights." *Matter of Brooklyn Heights*, 288
2. When such proprietors declared their willingness to dedicate their property to the purposes of a street, whenever the public authorities would accept the dedication, the property, nevertheless, continued subject to their control and absolute enjoyment until such acceptance was made. *ib*
3. In determining the value of land thus taken, it is proper for the commissioners of estimate to take the fact of such dedication, and the probability of its future acceptance, into consideration; and if the property is thereby depreciated, the amount of the depreciation may be properly deducted from what would otherwise have been the fair, full value thereof. But it is erroneous to allow a nominal compensation, only, to the owners. *ib*

*See* STREETS.

### C

### CARRIERS.

1. By the contract between the owners of goods and common carriers, risks by fire, in the transportation of the goods, were expressly excepted. *Held* that by the terms of the contract, only ordinary risks were intended, and that the carriers were not excused from liability, in case of loss, if the loss was caused by the fault or negligence of the carriers, or their agents or employees. *Stadman v. The Western Transportation Co.* 97
2. *Held, also*, that the carriers were exempted from liability for a loss of the goods occurring by fire while in a railroad depot at an intermediate point, on the line of transportation; unless their negligence, as common carriers, in transporting the goods, contributed to produce the loss. *ib*
3. Where no particular time is named within which goods are to be forwarded, or that they shall be forwarded at once, without any delay, carriers are entitled to such time as will be reasonable in the ordinary course of the business in which they are engaged. *ib*
4. Goods received by the defendants, as common carriers, from the plaintiffs, at Boston, to be transported to the west, arrived at the railroad depot, at East Albany, on the 27th and 28th of June, 1861, and were stored in the warehouse of the railroad company, where they remained until the 5th day of July, when the warehouse and its contents were destroyed by fire. The defendants had no direct notice of the arrival of the goods, but they were left to be called for, in the usual course of business, which was for the defendants to send a boat for them once a week, or once every two weeks, or as often as there were enough to send a boat for. *Held*, that the delay in the transportation of the goods was not unreasonable, but in accordance with the usual course of business, and not beyond the ordinary time allowed for that purpose. And that there was no rule requiring the defendants to act *immediately*, and transport what goods were on hand without regard to the quantity, or the expense caused by thus deviating from their usual custom and practice. *ib*
5. Where, in an action against carriers, the plaintiff intends to claim that there is a disputed question of fact in regard to the defendant's negligence, he should make a distinct request that it be submitted to the jury. *ib*
6. It is well settled that when a loss to cargo, from leakage or otherwise,

occurs in the port where it is laden, and before the voyage begins, the carrier is liable for its value at such port. But when the loss happens after the vessel has left the port of shipment, then the value of the goods at the place of destination, deducting the charges, furnishes the true rule of damages. *Krohn v. Oechs*, 127

7. In an action by the plaintiffs as owners of ninety-one kegs of tobacco, to recover the damages sustained by the tobacco while in the defendants' possession as a common carrier, it appeared that the tobacco had been sold by the plaintiffs to *arrive*—sixty-seven kegs to S. & Co., and twenty-four kegs to C. & Co. The whole was consigned to S. & Co., but they refused to take the tobacco in fulfillment of the sale to them, on account of its damaged condition, and so notified the plaintiffs. C. & Co. took the twenty-four kegs at the contract price, sixty-two and a half cents per pound, but it did not appear that it was taken on account of that contract. *Held* that these facts did not warrant the objection that the tobacco was delivered by the plaintiffs to the purchasers, and that no right of action for the recovery of damages remained in the plaintiffs. That the tobacco having been damaged before it reached the purchasers, the delivery could not be claimed as a performance of a contract for the delivery of sound tobacco. *Withers v. The New Jersey Steamboat Co.* 465

8. *Held also*, that there was no ground for objecting that S. & Co. could not act as agents or consignees of the tobacco for the account of the plaintiffs; they having notified the plaintiffs that they did not receive it as purchasers. 46

See ATTACHMENT, 1.

#### CASES QUESTIONED AND COMMENTED ON.

1. The decision in *Stevens v. The Phoenix Ins. Co.* (24 How. Pr. 517,) questioned. *Per* BARNARD, J. *Ayres v. Western Railroad Corporation*, 182
2. The cases of *Champlin v. Rowley*, (18 Wend. 187,) and *Paige v. Ott*, (5 Denio,

406,) commented on, and held not to contradict the principles of this decision. *Matthews v. Hobby*, 167

#### CERTIFICATES OF INDEBTEDNESS.

See TAXES AND TAXATION, 9, 10, 11, 12.

#### CHALLENGE TO THE ARRAY.

See CRIMINAL LAW, 1, 2, 3.

#### CHECKS.

See BILLS OF EXCHANGE, 1.

#### CLAIM AND DELIVERY.

1. An action for claim and delivery of personal property may be brought against the wrongdoer, although he has parted with the possession of the property before the commencement of the action. *Ellis v. Lerner*, 589
2. Where the defendant was charged with fraudulently obtaining the plaintiffs' property, and with having placed it on board of a vessel, and consigned to his uncle, in London, and it was alleged that the defendant had drawn drafts upon the bill of lading, payable when the property should arrive; *Held* that the case came within the above rule; and that the plaintiffs had a right to ask a jury to pass upon these questions, and, if they found the transaction to be fraudulent, to recover the value of the goods, if possession could not be delivered. 46

#### CONFESSIONS.

See CRIMINAL LAW, 14, 15.

#### CONSTITUTIONAL LAW.

1. Congress has the power to pass an act prohibiting the state judges from interfering with enlistments in the

army or navy, upon *habeas corpus*.  
*Matter of O'Connor*, 258

2. The 12th section of the act of the legislature of 1867, (*Laws of 1867*, ch. 806,) which commits to the Board of Metropolitan Police all the powers and duties conferred by law upon the mayor, the common council, the mayor and council, and all other boards and officers of the city of New York, (except the Metropolitan Board of Health,) in respect to the various subjects specified in the section, and also authorizes such board of police to alter, amend, modify or repeal all ordinances in force at the time of the passage of the act, concerning the persons, occupations or matters in said section mentioned, contravenes the provision of section 2, article 10, of the constitution of this state, which declares that "all city, town and village officers whose election or appointment is not provided for by the constitution, shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose," and is therefore void. *The People v. Acton*, 524

3. The legislature cannot confer the power to discharge duties, and make regulations and pass laws relating thereto, upon state officers, no matter how appointed, whether by the governor and senate, or by the legislature. And although the legislature might have the power to take the discharge of such duties from the mayor or common council of New York, they were required to place the performance of them with local officers or boards, and could not vest officers appointed under authority of the state with the performance of such duties. *ib*

#### CONTEMPT.

See *APPEAL*, 2, 3.

#### CORPORATIONS.

1. When a foreign corporation, by its officers, comes within this state, it becomes subject to the laws of the

state, and to the process of the courts; and where such a corporation, by its officers, is guilty of a wrong, or commits a trespass, within the state, the corporation cannot escape the consequences of its illegal acts, by setting up that it holds its existence under a foreign government. *The People v. The Central Railroad of New Jersey*, 478

2. Where a complaint in behalf of the people of this state against a foreign corporation, shows a claim of title to, and jurisdiction over, certain waters, by the plaintiffs; that the defendants have taken possession, and are by their officers still in possession, and without authority, this is sufficient to give jurisdiction, if the process can be served on the defendant. If there is an improper service, that must be remedied by motion. *ib*

#### See RAILROAD COMPANY.

RECEIVER.

PRACTICE, 6, 7, 8.

#### COUNTER-CLAIM.

1. A counter-claim, or defense of an equitable nature, may be interposed although the claim or demand mentioned in the complaint is purely of a common law nature, or for the recovery of money only. *The Hicksville, &c. Railroad Company v. The Long Island Railroad Company*, 355
2. If the claim and counter-claim arose out of the same transaction or contract, there is no necessity for a cross action by the defendant. *ib*
3. The plaintiff sued to recover six months rent of its branch railroad, under a written lease thereof to the defendant, and the defendant set up as a counter-claim, an extinguishment of the right to recover rent, arising from a tender of the purchase price of the branch road, under an option or privilege contained in the lease, before the rent accrued, &c. The lease was of the branch railroad, the land upon which the same was built, embracing the titles, &c. and generally the property "as it now exists," (at the date of the lease,) the cost of which was \$45,304. The

right to purchase was of the *demised premises*, upon payment of the said cost thereof, and all rent computed to the time of purchase; and upon payment, the said *demised premises* were to be conveyed, free from incumbrance. When the tender was made, the defendant required the plaintiff to convey to the former company a *perfect title*, or to convey *with covenant of warranty* as to the title. *Held* that the defendant, when making such tender, required more than its contract permitted; and the tender was therefore no bar to the claim for rent, and did not prevent its accruing in future. *ib*

4. *Held, also*, that the plaintiff not having demanded, but on the contrary, having resisted, a specific performance in the manner claimed by the defendant; and the defendant having sought to compel the plaintiff to complete its title, at an additional expense, by the tender of the cost, only, of the demised premises, as they existed at the date of the lease, neither party was in a condition to demand a specific performance, in respect to a conveyance of the premises. *ib*

5. *Held further*, that the facts did not warrant a decree compelling the defendant to pay \$45,804, as upon an option or privilege of which it had never sought to avail itself. *ib*

6. The right to recover for money lost in betting is a demand arising on contract, and may be set up as a counter-claim, under section 150, subdivision 2, of the Code of Procedure. *McDougall v. Walling*, 384

#### COUNTY COURT.

The county court has jurisdiction, upon the written consent of the parties, to order a reference in a case brought before it by appeal from a justice's court, where there is an *issue of fact* joined between them. *Hyland v. Loomis*, 126

#### CRIMINAL LAW.

1. The mere fact that the sheriff has expressed his opinion that the pri-

soner is guilty, in a criminal case, is not a ground of challenge to the array. It is necessary for some other fact to be alleged, in the challenge, to render the charge material; as that the sheriff has intentionally omitted to summon some juror, or has stated his opinion to some juror. *Ferris v. The People*, 17

2. Mere irregularities in drawing and summoning the jurors, not shown to have prejudiced the prisoner, are not a ground of challenge to the array, where there is no charge of fraud or corruption in any of the officers who drew or summoned the jurors, or certified the list. *ib*

3. Nor is it a ground of challenge to the array, that the court excused and excluded 764 of a panel of 1000 jurors drawn, from attendance, without reasonable cause shown; the act being within the proper discretion of the court. *ib*

4. No venire is necessary, in criminal cases. The writ has been expressly abolished in civil cases; and jurors in criminal cases are required to be summoned in the same manner as in civil cases. *ib*

5. A plea of a former indictment for the same offense, arraignment thereon, plea of not guilty, and the commencing of the trial, when the same was abandoned, without going to the jury, is no bar to a second indictment. *ib*

6. Where no objection is made in the court of general sessions of New York, that the trial was had after the close of the third week of the term, it cannot be urged as a ground of objection on writ of error, that no order for the continuance of the term appears on the record of judgment. The omission to incorporate that fact in the record does not show that the order was not duly entered on the minutes of the court. It is not necessary it should be included in the record; and every intendment is in favor of the regularity of the proceedings. *ib*

7. Where a juror on the trial of an indictment for murder, on being challenged for principal cause, stated that he had read a statement in the

- newspaper, of the homicide, but that although he had an impression that a homicide was committed, he had none as to the guilt or innocence of the prisoner; *Held* that the challenge was properly overruled. *O'Brien v. The People*. 274
8. The prisoner then challenged the juror for favor, and demanded triers. These having been sworn, the juror again testified that he had read the statement in the newspaper, without any impression remaining on his mind, of the guilt or innocence of the prisoner; that "it would require evidence, either the one way or the other, to make him convinced of the prisoner's guilt or innocence." The prisoner's counsel requested the judge to charge that the challenge was well taken, as matter of law. The judge declined so to do, and submitted the question of the impartiality of the juror to the triers. *Held* there was no error in this; and that it was properly given to the triers to decide that question. 23
  9. Another juror, being challenged for principal cause, testified that he had conscientious scruples in finding a verdict where the penalty was death; but that his scruples would not prevent him from finding a verdict of guilty of murder, where the evidence required him to do it; *Held* that the juror was properly set aside as incompetent. 23
  10. Where a juror states that he has conscientious scruples against finding a verdict involving the penalty of death, he is directly within the inhibition of the statute, as to jurors serving who hold such scruples. 23
  11. When a juror has conscientious scruples in finding such a verdict, his competency is not established or restored by a statement that he would render a verdict of guilty, if the evidence required it. 23
  12. A juror, being challenged by the prisoner's counsel for favor, testified that he thought he read or heard the statement of the homicide, published in the paper, and believed that a homicide was committed by the person charged in the paper, but it left no impression on his mind, as to the guilt or innocence of the party. *Held* that the challenge was properly overruled; the result of the evidence being that there was no impression on the juror's mind, as to the guilt or innocence of the prisoner; the person charged in the paper not being identified as the prisoner. 23
  13. An indictment charged the prisoner, in one count, with the murder of *Lucy McLaughlin*, and in another with the murder of *Kate Smith*. The counsel for the prisoner moved the court that the prosecution be required to elect upon which count the prisoner should be tried. The court reserved the question. It was proved that the deceased was usually known by the name of *Kate Smith*, but there was some evidence tending to show that her name was *Lucy McLaughlin*. At the close of the evidence the prosecution entered a *nolle prosequi* as to the count charging the murder of *Lucy McLaughlin*, and the jury found the prisoner guilty, upon the other count, of the murder of *Kate Smith*. *Held* that there was no error in this. 23
  14. Confessions are excluded only when they are made under circumstances that tend to produce doubt as to their truth, arising from the operation of hope or fear in the mind of the prisoner. When made under the effect of threats, or the sanction of an oath, without the proper caution being given that he need not answer, and that what he says may be used against him, and some other circumstances, the admissions are excluded, as matters of law. 23
  15. But where the admissions are purely voluntary, they are to be submitted to the jury for what they may be deemed worth. 23
  16. A non-professional witness was asked for his opinion as to the mental condition of the prisoner, at the time of the occurrence. His opinion was excluded. *Held* that the ruling was correct. 23
  17. When insanity is interposed as a defense, it is not incumbent on the people to establish the sanity of the prisoner at the time of the commission of the offense, by affirmative evidence. 23

18. On a trial for murder the prisoner has no right to ask the court to charge the jury that they may infer, from the presence of intoxication, the absence of premeditation. *ib*
19. A charge that "if there be sufficient deliberation to form a design to take life, and to put that design into execution by destroying life, there is sufficient deliberation to constitute murder, no matter whether the design be formed at the instant of striking the fatal blow, or whether it be contemplated for months," is a very sufficient definition of murder in the first degree, when occurring with premeditation. *ib*
20. *Delirium tremens*, like insanity, if it deprives one of the capacity to know what he is doing, or of knowing right from wrong, saves him from any criminal responsibility for his acts. *ib*
21. On the trial of an indictment for robbery, the defense was an *alibi*. The evidence of two witnesses tended to show that when the crime was committed, at half past ten o'clock in the morning of July 30th, the prisoner was at home, at his mother's house, in bed. The judge, in charging the jury, substantially told them that it was for them to determine whether they believed the witnesses who had testified to the *alibi*; that it was singular that a boy like the prisoner should be in bed from seven to half past eleven in the morning, in July, unless he was sick, or there was some other special reason; and that the circumstance that neither his mother, nor any one of his family, had been called to show that he was sick, or to explain the fact of his thus being in bed, might or "would probably turn the scales." Held that, looking at the whole charge, the inference was that the judge meant, and that the jury understood him as meaning, that on the question as to the credit they would give to the witnesses who had undertaken to prove an *alibi*, the circumstance mentioned by the judge might or probably would turn the scales. And that the language, though strong, afforded no ground for granting a new trial. *McGrory v. The People*, 466
22. The judge, in his charge, also said: "A crime of this kind is generally perpetrated at night, but this was in broad day light, at half past ten o'clock, in one of our public thoroughfares; a child with money in his pocket, taken up and carried in an alley, knocked down, robbed and left. If they are guilty, they deserve a severity of punishment greater than any punishment that has been imposed this term, on any person tried. There is some excuse at night, when an attack of that kind is made, but it is a *much graver offense, and requires graver consideration where they are so desperate as to make it in broad day light.*" Held that there was no error in this; that it was plain the judge merely meant to say, and in substance did say, that to commit a robbery like that with which the prisoners were charged, in broad day light, &c. showed a greater boldness, hardihood or recklessness in crime, than committing a like robbery under cover of the night. *ib*
23. On the trial of an indictment for murder, the judge charged the jury that they were to decide "whether it was murder, or whether it was a case of justifiable or excusable homicide." After defining the crime of murder, he told them the intent must be clearly proven, or they could not convict of murder. He then explained to the jury the law as to justifiable and excusable homicide, and submitted to them whether the prisoner was justified in using a deadly weapon. He also told the jury if they had any doubt as to which degree of murder to convict the prisoner of, it was their duty to convict of the lesser degree of guilt. That if they had any reasonable doubts that the prisoner intended, at the time the blow was struck, to take life, and they believed it was done in the heat of passion, then they could convict of the lesser degrees. Held there was no error in the charge. *Manuel v. The People*, 648
24. In criminal cases the court is required to order a new trial, if it is satisfied that the verdict is against evidence, or against law, or that justice requires a new trial. *ib*
25. Where the court, upon a writ of error, came to the conclusion from an examination of the evidence, that under any view to be taken of the

case, the homicide was only one of killing in the heat of passion, arising out of a sudden quarrel, without a design to effect death, by a dangerous weapon, and therefore was only manslaughter in the third degree; *Held* that a conviction of murder in the first degree was not warranted by the evidence, and that under such circumstances it was the duty of the court to order a new trial. *ib*

## D

## DAMAGES.

1. It *seems* there is no uniform rule of damages to apply to the various cases in *tort* which continually come before the courts for adjudication. *Edwards v. Beebe*, 106
2. The courts do not, however, favor the doctrine of giving any thing more than the necessary and unavoidable damages in cases of *tort* without aggravation. *ib*
3. Where the referee allowed the plaintiff damages to the extent of the value of his horse, lost by occasion of a collision of boats at Schenectady, and added thereto interest up to the time of making his report, *Held* that it was error to allow another sum as damages for the loss of the use of the plaintiff's horse in towing his boat to Rome. *ib*

*See* AGREEMENT, 3, 4.

## DEBTOR AND CREDITOR.

1. A man confessedly in embarrassed circumstances, and, as the result shows, insolvent, seeing that a firm of which he is a member must probably fail, may lawfully appropriate his private property to the payment primarily of his private debts, in preference to the partnership debts, by conveying and transferring such property to his private creditors, in payment of their just demands; and such conveyances and transfers will be valid; where there is nothing to impeach the good faith of the grantees, or tending to show that they were privy to any concealment or

fraudulent intent or purpose on the part of the grantor, in disposing of his property. *The Auburn Exchange Bank v. Fish*, 344

2. An individual may, at all times, convey or turn out his property in payment of his just debts; and this is none the less true because he is straightened in his circumstances and unable to pay all his creditors. At such times he may honestly prefer one creditor to another; and if he sells and conveys his property for a fair price, in payment of just debts, the legality of the conveyances or transfers cannot be questioned. Fraud cannot be predicated upon such a transaction, on the assumption that the debtor meant to defraud his creditors. *ib*
3. An intent on the part of the grantees to defraud, or to concur in, or aid in carrying out or consummating any fraud on the part of the grantor, cannot be imputed or inferred from the fact that such grantees did in fact receive transfers of all the property of the grantor, and must have known that his other creditors could not be paid. *ib*
4. The law is not so unjust as to forbid a son from paying an honest debt to his mother, by a conveyance to her of his family residence; nor is it so unreasonable as to require her to turn her son into the street, at the peril of losing the estate. *Per E. D. Smith, J.* *ib*

## DEDICATION.

*See* STREETS, 8, 9.

## DEED.

1. A conveyance made to children, for love and affection, is not fraudulent or void against subsequent creditors if, at the time of the conveyance, the grantor had sufficient property, otherwise, to pay then subsisting debts. *Holmes v. Clark*, 237
2. Such a conveyance would be void as to existing creditors at the date of the conveyance, if their debts were not otherwise paid. *ib*

3. It is not necessary that the grantee should be a participator in the fraud, to avoid the deed. Though he may have received the conveyance honestly, and in ignorance of the fraud, the conveyance may be void. *ib*

4. If the grantee, without knowledge of the intended fraud, becomes the purchaser for value, he should be protected, although the grantor acted from fraudulent motives. *ib*

5. A grant made without other consideration than love and affection cannot be set aside in favor of creditors not being such until two years after the conveyance; unless the transaction was fraudulent as between the parties, and made to defraud subsequent creditors. *ib*

6. Where the facts, as stated in the plaintiffs' opening, were that the conveyance sought to be set aside was made by the grantor, to her infant children, in 1861; that A. and M. were creditors of the grantor, at the time of the conveyance, and as such had obtained a judgment declaring the conveyance void as to them; that the indebtedness of the grantor, to the plaintiff, did not exist until the close of 1868; and there was no allegation of insolvency, other than as to A. and M., and none that it continued until the debt to the plaintiffs was contracted; *Held* that the judge properly dismissed the complaint. *ib*

7. *Held, also*, that the plaintiffs should have shown either that their claim was for a subsisting indebtedness, or that the conveyance was made with intent to defraud subsequent creditors, which was to be inferred from the proof of fraudulent intent on the part of the grantees as well as of the grantors. *ib*

8. Legal proof of the identity of the persons appearing before an officer for the purpose of acknowledging the execution of an instrument, is necessary, when the officer has no previous knowledge of them. A mere introduction, at the time, is not sufficient. *Jones v. Bach*, 568

9. When this previous knowledge does not exist, the officer must take satisfactory evidence, under the solemn-

ty of an oath or formal affirmation, of the identity of such persons. *ib*

*See EQUITY*, 1, 3, 4.

## DELIRIUM TREMENS.

*See CRIMINAL LAW*, 20.

## DESSERTERS.

1. The act of congress authorizing the arrest of persons as deserters, being in derogation of the common law, must be strictly pursued. The duties imposed by it are ministerial, and in the proper discharge of them the officer is bound to embrace the first opportunity to bring the prisoner before a competent tribunal, where he may be tried for the offense charged. *Hawley v. Butler*, 101

2. Where the plaintiff was arrested, without warrant, by a deputy provost marshal, on the charge of being a deserter, and taken by him to the office of the provost marshal, who, after examination, directed the deputy marshal to convey the plaintiff to the county jail, where he was kept in close confinement for several days: *Held*, that in so doing, the marshal and his deputy acted in violation of the statute and exceeded their authority, and were liable to an action. That they had no legal right to make such an unreasonable detention, before sending the plaintiff to a military commander, or a military post. *ib*

## DIVORCE.

*See MARRIAGE*.

## DOWER.

1. A testator having executed his bond to pay a debt secured by his mortgage upon his real estate, which was also signed by the defendant, (his widow,) devised all his real and personal estate to his executors with directions to sell the same, and after paying his debts and incumbrances, to invest a portion of the residue for the benefit of his widow, in lieu of dower. The widow having elected

to take dower instead of the provision made for her in the will; *Held* that she took dower only in the equity of redemption, and was liable to contribution towards the payment of the mortgage debt. *Leavenworth v. Cooney*, 570

2. *It seems*, however, that if the testator had not been personally liable to pay the mortgage debt, his direction that the same should be paid by his executors out of the proceeds of his real and personal property, would be strong, if not conclusive evidence of his intention to relieve the dower interest of his widow from the burden of contribution. *ib*

## E

### EJECTMENT.

1. Where, in an action of ejectment it appears from the complaint that the relation of landlord and tenant exists between the defendants, and they omit to set up the misjoinder, in their answer, it is too late on the trial to successfully raise that question. It will be presumed, in such a case, that the landlord intended to waive that objection, and elected to remain a party defendant in the action. *Ames v. Harper*, 56
2. The plaintiff claimed title under a deed from C. to him, purporting to convey the premises in question, and then proved by R. that he (R.) hired the premises of one S., who assumed to let the same as the agent of C. and that he had paid the rent to S. There was no evidence that either C. or the plaintiff ever occupied the premises, or that either of the defendants entered under C. or the plaintiff, or in any manner recognized their right to the premises. *Held* that the bare assertion of R. that S. assumed to rent the premises to him, as the agent of C. was inadmissible as against the defendants, and proved nothing against them; and that the plaintiff had failed to establish a cause of action. *ib*
3. The section of the Revised Statutes, providing that "if the right or title of a plaintiff in ejectment *expires* after the commencement of the suit, but

before trial, the verdict shall be returned according to the fact; and judgment shall be entered that he recover his damages by reason of the withholding of the premises by the defendant, to be assessed; and that as to the premises claimed, the defendant go thereof without day," does not apply to an action of ejectment for the non-payment of rent, brought by the plaintiff as devisee of the lessor, against the defendant as devisee of the lessee, where the plaintiff, after the commencement of the action and before trial, conveys to third persons all his right and interest to and in the claims involved in the action, and in the premises in controversy. *Van Rensselaer v. Owen*, 61

4. The plaintiff's title, in that section, has reference to the *estate* or interest in the premises, which for the time being is in the possession of, or represented by, the plaintiff, and not merely to the *person* who is *at the time* the owner of the estate. It is the *title upon which a plaintiff seeks to recover*. *ib*
  5. If the *estate expires*, that is, cease or come to an end, the defendant should, as to the premises claimed, go thereof without day, and the plaintiff recover his damages for the unlawful withholding, up to the estate terminated; but if the estate continues to exist, though in other hands, the defendant should be permanently discharged from liability therefor; while the plaintiff, if he recovers them, recovers them as trustee in fact of him who since the commencement of the action has become the real party in interest. *ib*
  6. An assignee, who takes an assignment of a contract of purchase, to secure a debt due to him from the assignor, cannot, on default of payment, maintain an action of ejectment against his assignor to recover the possession of the lands. *Campbell v. Swan*, 109
- See EVIDENCE, 1.  
JUDGMENT, 1, 2, 3.

### ENLISTED MINORS.

1. The acts of congress, of February, 1862, and of February and July,

1864, conferring upon the Secretary of War the authority to discharge enlisted minors, upon certain terms and conditions, are to be construed as having provided a mode by which persons improperly enlisted can be discharged, and as having forbidden other modes of obtaining their discharges. LEONARD, J. dissented. *Matter of O'Connor*, 258

2. The federal government has by those acts assumed such jurisdiction, in cases of this kind, as to make it necessarily exclusive. *Per CLERKE J.* 258

EQUITY.

1. The defendant agreed to sell and convey to W. and C. a lot of land, twenty-six feet six inches in width, being in depth on C. street one hundred and twenty feet "to and including the stable on the rear of the premises." The defendant executed and delivered a deed for the lot, describing it as one hundred and twenty feet in depth, but making no mention of the stable. There was a stable on the rear of the premises, built by a former owner, situated partly upon the said lot, but eleven feet and ten inches thereof were located on the rear of another lot belonging to the defendant. Both parties acted in the erroneous belief that the one hundred and twenty feet so conveyed included the stable, and neither knew that any portion of it was located upon another lot. *Held* that this was not a case for the equitable interposition of the court to reform the deed, so as to make it conform, as to the dimensions of the premises, to the previous agreement between the parties. *INGRAHAM, J.* dissented. *White v. Williams*, 222
2. A court of equity never grants that relief, except when the mistake is very plain, and operates contrary to the intention of the parties. *Per CLERKE, J.* 258
3. A claim made for relief, or for a deed, upon terms to which a party is not entitled, does not subject him compulsorily to accept a deed upon some other terms. *Hicksville, &c. Railroad Company v. The Long Island Railroad Company*, 355

4. In such a case the relief demanded should be denied, simply with or without costs, according to the regulated discretion in equity cases. 258

ESTOPPEL.

*See OFFICERS*, 2.

EVIDENCE.

1. Where the defendant, in an action of ejectment, claimed that the plaintiffs purchased the premises at the defendant's request, under a verbal agreement that the latter should occupy and have the premises as his own, in consideration that he would support their mother during her life, which he alleged he had performed, but which agreement as well as performance was denied by the plaintiffs; *Held* that letters written by the vendor to the plaintiffs at the instigation of the defendant, or with his knowledge, containing propositions in relation to the sale, inconsistent with such an agreement, were admissible in evidence as part of the *res gestæ*. *Moore v. Hamilton*, 120
2. An objection that the cause was irregularly put upon the calendar, by the plaintiff's counsel, and urged to trial, should be brought before the special term, on motion to set aside the verdict, and cannot be alleged as error after a trial has been had. It is not a ground of error, affecting the judgment, upon an appeal therefrom. *Macklen v. Marsh*, 267
3. Where, in an action upon a promissory note, against the indorser, a witness testified that he procured the indorsement of the defendant at the request of the maker, and that the indorser had no interest in the note, or in its proceeds; *Held* that a certificate, given by the witness to the plaintiffs, before the discounting of the note, stating that the note was business paper, was admissible in evidence for the purpose of affecting the credibility of the witness, by showing that he had made a statement at variance with the testimony given at the trial, under circumstances tending to defraud the

: plaintiff if the certificate was untrue. *ib*

4. Where a judge was requested to charge the jury that entries made by witnesses, in the books of a bank, of what they swore they did, at the time, were evidence of the facts, and entitled to the same credit as their evidence, although the witnesses making the entries did not recollect them; and that such entries were more reliable than the recollection of the plaintiff, after a lapse of nearly six years; *Held* that such request was properly refused; and that it was correctly left for the jury to say, upon all the evidence, which was entitled to the greater weight. *Hutchinson v. Market Bank of Troy*, 302

5. Parol evidence of prior oral negotiations tending to establish the fact that an erroneous amount was inserted in a bill of sale and in a release is admissible, for the purpose of proving that the consideration for a sale of property was wrongly stated in the bill of sale, and release at \$4650, instead of \$4250. And this although the plaintiff has not, in his complaint, formally asked for a reformation of the contract. *Rosboro v. Peck*, 92

6. The pleadings can be amended, in such a case, so as to render the testimony entirely admissible. The court is authorized to amend the complaint to conform it to the proof, and all the facts having been elicited, they will be regarded as if the amendment had actually been made. *ib*

7. Parol evidence is not admissible to vary, enlarge or contradict a written stipulation, made by an indorser of a promissory note, waiving "notice of protest." *Buckley v. Bentley*, 283

8. The rule excluding parol evidence to enlarge or contradict a writing, is not limited to contracts made upon a consideration passing between the parties, but is equally applicable to all cases where the writing was designed to be the repository and evidence of the final conclusions of the parties. *MASON, J. dissented.* *ib*

*See* PROMISSORY NOTES, 2, 3, 4, 5.  
WITNESS, 8.

## EXECUTORS AND ADMINISTRATORS.

1. The plaintiff brought suits against A. and P., as administrators of N. A. deceased, for services rendered to N. A., and recovered judgments. He then applied to the surrogate, for an order that A. and P. pay such judgments out of the estate of the intestate, and an order was made by the surrogate, directing the payment by A. and P. within five days. Payment was not made, and the decree being docketed in the common pleas, an execution was issued from that court, against the administrators. This not being paid, the surrogate, on application made to him, assigned to the plaintiff the official bond given by the administrators. In an action upon such bond, against the sureties, *Held* that the proceedings of the plaintiff were regular; and that the action was well brought. *Thayer v. Clark*, 248

2. *Held, also*, that the decree of the surrogate was conclusive upon the administrators. That if they had any defense it should have been made in that proceeding. *ib*

3. That the surrogate's decree established the indebtedness of the estate to the plaintiff; and when that was established by the decree of a competent tribunal the administrators were bound to pay it. And that on their neglecting to do so, the bond which they gave as administrators, with sureties, was forfeited. *ib*

4. The sureties in such a bond have no right to go back of the decree of the surrogate directing the payment of a debt, by the administrators, and show that such decree was erroneous. It is conclusive as to the indebtedness of the estate, and as to the obligation of the administrators to pay it. *ib*

5. The act of 1837, authorizing the assignment of an administrator's bond, to a creditor, by the surrogate, where an execution issued upon his decree should have been returned unsatisfied, and the prosecution of such bond by the creditor, (*Laws of 1837, ch. 460.*) applies to *any* decree made by the surrogate for the payment of money, by an adminis-

trator, and not merely to a decree for a general accounting by him. *ib*

**EXPRESS COMPANIES.**

*See* REVENUE STAMPS, 4, 5, 6.

**F**

**FRAUD.**

*See* DEBTOR AND CREDITOR.

**FRAUDULENT CONVEYANCES.**

*See* DEEDS, 1, 2, 3, 4.

**G**

**GIFTS.**

1. If the evidence be such as to show that an intended gift of promissory notes made to secure the payment of the consideration of a conveyance of real estate, did not take effect, or was revoked, the remedy of the donor's administrator is by a bill in equity, to recover the consideration of the notes from the makers, or to avoid the sale out of which they arose, and to get back the property sold. *Fenton v. Fenton*, 581
2. By the common law, personal property may pass by gift or grant, with or without deed; but a parol gift, without some act of delivery, will not alter the property, whether by act *inter vivos* or *mortis causa*. But where a gift *inter vivos* is perfected by delivery of possession of the thing, or *delivery of a deed of gift*, it is complete, although made without any consideration. *ib*
3. An agreement between F. and his two daughters, the defendants, made on the 15th of November, 1851, contemporaneously with the sale to them of his farm and personal property, recited the consideration of such sale, which consisted in part of their five several promissory notes, each for the sum of \$500, payable to the three sons and two daughters of F. at the decease of his wife. The

agreement referred to those notes as being the portions that F. wished the payees to receive out of his property after the decease of himself and his wife. In December, 1857, these notes were canceled, and F. caused the makers to execute new notes in renewal, and signed a paper declaring that he intended the new notes should be considered by his children "in full of their shares in his property which he had or ever had had." *Held* that this transaction was not fraudulent as to creditors; that no trust was created for the use of the grantor; and that it was a fair and just distribution of his estate among his children. *ib*

4. *Held, also*, that it transferred the legal title to the debts represented in the notes; and, with the accompanying declaration contained in the agreement, and the paper of December, 1857, furnished satisfactory evidence that there was a delivery of the notes to the payees, and that the possession of them afterwards by F. was as trustee for them. *ib*
5. *Held, further*, that the fact that the notes were left by the donor in a position where the beneficiaries might take them after his death was convincing proof that he did not change his mind; and no further formality, to complete the gift, was necessary. *ib*
6. It is only when something remains to be done, by or on behalf of the donor, which is not done before his death, that a gift fails to take effect. *ib*
7. An actual transmutation of possession is not essential, when the settler intends to convert himself into a trustee, and makes a sufficient declaration to that effect. *ib*

**GRANT.**

*See* DEED, 5.

**H**

**HABEAS CORPUS.**

*See* CONSTITUTIONAL LAW, 1.

## HIGHWAYS.

*See* RIVERS.

## HUSBAND AND WIFE.

Where, on application to the surrogate for letters of administration, it appeared that an alleged marriage was celebrated by the husband under an assumed name; was not consummated for five years thereafter, when the parties first cohabited together; and the husband had always lived apart from the wife until his death; and had not acknowledged the marriage, to his family; *Held* that upon these facts, in connection with newly discovered evidence that the husband was absent from the city at the time of the alleged marriage, justice to all parties required that the question of fact as to a marriage having taken place should be submitted to a jury. *Angovine v. Angovine*, 417

*See* *Leitch v. Walls*, 687.  
WITNESS, 1.

## I

## INDICTMENT.

*See* CRIMINAL LAW, 4, 18.

## INJUNCTION.

Where, in an action brought by the people of the state of New York against a foreign railroad corporation, it appeared from the pleadings that the defendants had taken possession of a tract of land under water, in the bay of New York, and the Hudson river, displaced the water by filling in the same to the extent of eight hundred acres, in a portion of the bay and river over which the state of New York has exclusive jurisdiction, and were engaged in filling in to a larger extent, and would cause serious damage to the harbor of New York; and that they were so doing without any right, and without any grant or permission from the plaintiffs; and by their admissions the defendants appeared as simple wrongdoers and trespassers, committing a

serious injury to the rights of property of the plaintiffs; *Held* that it was a proper case for restraining them, by injunction, from doing further wrong and damage, until it should appear that they had some right and authority for their proceedings. *The People v. The Central Rail Road of New Jersey*, 478

*See* SHIPS AND VESSELS, 8.  
RIVERS, 7.

## INSANITY.

*See* CRIMINAL LAW, 17.

## INSURANCE, (FIRE.)

1. A policy of insurance against fire purported to cover "merchandise hazardous, not hazardous, and extra hazardous, their own or held by them in trust or on commission or joint account, &c. in all or any of the brick or stone warehouses, and while *in transitu*, or on any of the streets, yards or wharves in the cities of New York, Brooklyn or Jersey City, and unless under the protection of a marine policy, subject to average clause annexed." To this policy was annexed this provision: "It is at the same time agreed that if any specific parcel of goods included in the terms of this policy, or such goods in any specified building or buildings, place or places, within the limits of this insurance, shall, at the time of any fire, be insured in this or any other office, this policy shall not extend to cover the same, excepting only so far as relates to any excess of value beyond the amount of such specific insurance or insurances, which said excess is declared to be under the protection of this policy and subject to average as aforesaid." The fire occurred at one of the places where the insured had merchandise, to the value of \$888,026. They had a specific insurance on the goods in that store to \$324,000. The loss and damage occasioned by the fire was \$274,192. In an action upon the policy, to recover of the insurers a *pro rata* amount of the loss in proportion to the amount insured; *Held* that the true interpretation of the policy was that if a loss occurred, and the

specific insurance exceeded the loss, the party insured was protected thereby, and had no claim under the general policy. That if the specific insurance fell short of the loss, the insured might recover on the general policy, for such excess. *Fairchild v. The Liverpool and London Fire and Life Ins. Co.*, 420

2. *Held, also*, that the fact that the whole loss was covered by, and to be paid by, the specific insurance, established a defense, under the policy, that there was no loss chargeable thereon. *ib*

#### INSURANCE, (MARINE.)

1. In time policies, the rules as to deviation do not apply to the same extent as in voyage policies. *Bearne v. The Columbian Insurance Company*, 445
2. Under time policies, the mere intention to deviate is not sufficient to avoid the policy, although during the period of the violation of the warranty, the vessel is not covered by the policy. *ib*
3. Time policies were issued by the defendants upon the bark *Cora*, and her freight; the policy on the vessel being for one year from June 19, 1862, and that upon the freight being for one year from June 20, 1862. The policy on the vessel contained a warranty not to use the Min river (in China) higher than the anchorage below the Kimpai pass. The bark sailed March 29, 1863, from Shanghai to Newchang, at the mouth of the Lian Ho river, in the northern part of China. In entering the Lian Ho river, the vessel was damaged, but the injuries were not such as to make her unseaworthy. On the 4th of May, 1863, the bark took in a cargo for Fu-chau-fu, a port on the Min river, and sailed therefor. On leaving Newchang she sustained more serious injury. After she left the Lian Ho river, she sustained no further disaster. On the 18th of June, 1863, she arrived at Pagoda anchorage, ten miles above Kimpai pass, on the Min river. Upon a survey held there, it was found that she was badly injured, and it was decided to dismantle and sell the

vessel, which was done. It being admitted that the injuries were sustained in entering the mouth of the Lian Ho river, on the voyage to Newchang, and on leaving that port at the same place, during the period the vessel was covered by the policy; *Held* that upon these facts there was nothing to warrant the court in holding that the insured was not entitled to recover for damage done to the vessel while she was not in violation of any of the provisions of the policy. That it was not in any way within the prohibition either to enter or leave the port of Newchang and the Lian Ho river; and whatever was intended after the vessel left that port could in no way affect the plaintiff's right of recovery for any damage previously incurred. *ib*

4. *Held, also*, that the policy upon the freight being intended to cover the freight during the whole period of insurance, and not confined to the period when the vessel sailed from the Lian Ho river, the warranty was violated when she entered the Min river above the Kimpai pass. That it mattered not what was determined upon afterwards, or what befell the vessel while that violation existed. The policy ceased to cover the freight from that time. And the vessel having been sold while in the river, and before the violation of the warranty terminated, the plaintiff could not recover for freight thereafter. *ib*
5. Where a policy of insurance upon a vessel contained a warranty not to use any ports in the British North American provinces, except between the 15th of May and 15th of August; *Held* that the warranty was broken by sailing on a voyage from Boston to a prohibited port, on the 24th of September, when the vessel was lost before reaching the port. *LEONARD, J. dissented. Snow v. The Columbian Insurance Company*, 469
6. A fair construction of such a contract would seem to require that the prohibition to use certain ports was intended to guard against the dangers incurred in reaching them; and where the sole object of a voyage was to do an act forbidden by the policy, the insurer should not be held liable for any loss connected therewith. *Per INGRAHAM, J.* *ib*

## J

## JUDGE'S CHARGE.

See CRIMINAL LAW, 8, 18, 19, 21, 22, 23.

## JUDGMENT.

1. Where an ejectment suit was brought by the assignee of the lessor, against the assignee of the lessee, for the non-payment of rent on a lease containing a covenant for re-entry, and a judgment was rendered therein in favor of the plaintiff, for the recovery of the possession of the premises; *Held* that such judgment was a bar to a recovery in an action brought by a party claiming through the purchaser at a foreclosure sale under a mortgage executed by the assignee of the lessee, subsequent to the date of the lease, but prior to the commencement of the ejectment suit; the judgment of foreclosure being entered after the ejectment suit was instituted, but previous to its termination. *Bennett v. Couchman*, 78
2. *Held, also*, that the lessee was a privy to the lessor, and the defendant in the ejectment suit, (the assignee of the lessor,) was also a privy. That the grantee in the mortgage executed by such defendant took subject to the rights of the lessor; and that the sale of the premises under the foreclosure proceedings did not in any way affect or impair those rights, or give the plaintiff any title, as against the defendant. *ib*
3. *Held, further*, that the title which the plaintiff claimed, through and under the defendant in the ejectment suit, being perfected by the foreclosure proceedings after the ejectment suit was commenced, the judgment in the latter suit, in connection with the title which the evidence established, under the lease, was conclusive against the plaintiff. *ib*
4. Irregularity in form does not render a judgment void. The irregularity can only be taken advantage of by the party on motion. *ib*
5. There is no objection to an admission by the defendant, in writing, of the facts alleged in the complaint, in

order to save the necessity of proving those facts. *ib*

6. And a judgment entered upon such written admission may be considered as a judgment entered by default, the answer having been withdrawn. *ib*

See *Leitch v. Wells*, 637.

## JURISDICTION.

The 17th section of the Act of Congress, which provides that the Circuit Courts of the United States shall not "have cognizance of any suit to recover the contents of any promissory note or other *chose in action* in favor of an assignee, unless a suit might have been prosecuted in such court, to recover the said contents, if no assignment had been made," applies to a claim against a railroad company, as a common carrier, to recover the value of goods entrusted to it for transportation; such a claim being a *chose in action*. *Geo. G. BARNARD, J. dissented. Ayres v. The Western Railroad Corporation*, 182

See CORPORATIONS.  
COUNTY COURT.  
ENLISTED MINORS.  
MARRIAGE.  
NEW YORK, (STATE OF.)  
OFFICER.

## JURORS.

See CRIMINAL LAW.

## JUSTICES OF THE PEACE.

1. The general power of amendment, given to courts of record in sections 172 and 173 of the Code, does not belong to justices' courts; nor do any of the general provisions in relation to the amendment of process and pleadings, contained in other parts of the Code and in the Revised Statutes, apply to justices' courts. *Gilmore v. Jacobs*, 836
2. Where the summons, in a justice's court, is sued out and served upon two defendants, the name of one of them cannot be dropped, in the subsequent proceedings, without leave

- of the court. But if the justice permits the plaintiff to declare against one of two joint defendants only, he will be deemed to have allowed an amendment of the summons, for that purpose, if he had any power to do so. *ib*
8. A justice of the peace has no power to grant an amendment allowing the plaintiff to strike out the name of a defendant from the summons, after service thereof, and to proceed to trial and judgment against the other defendant, alone. *ib*

L

LANDLORD AND TENANT.

1. Where a parol agreement provided for the renting of premises for one month from the 1st of August, 1866, and for each successive month thereafter until the landlord should want the premises for his own use, whereupon the tenancy should expire; *Held* that under such an agreement a notice of thirty days was not necessary to terminate the tenancy. *The People ex rel. Glenhill v. Schaackno*, 551
2. The notice served by the landlord upon a tenant at will, to terminate his tenancy, takes effect in thirty days after the service; and the specification therein of a day on which the time will expire, which will be less than thirty days from the time of service, will not vitiate the notice. *ib*
3. The affidavit by which summary proceedings for the removal of a tenant are initiated, need not state the date, or duration of the lease. *The People ex rel. Teed v. Teed*, 424
4. The facts stated in such affidavit, and not denied by the affidavit of the tenant, are admitted. *ib*
5. Where the facts put in issue are the ownership of the premises, and the hiring thereof to the tenant, proof of a conveyance to the landlord, and the payment of rent to him by the tenant, establishes both of these issues against the tenant. *ib*
6. If the nature of the hiring was such that the landlord could not take the remedy by summary proceedings, the tenant must set up that defense. *ib*
7. The statute requiring that upon summary proceedings an officer shall be sworn to keep the jury, &c. is directory in that respect; and though the return does not show that an officer was sworn, the court cannot infer that the jury were not kept by an officer, or that he was not sworn. *ib*
8. It being the duty of the magistrate to swear an officer, the intendment of the law, in the absence of proof to the contrary, is that he performed his duty. *ib*

*See EMBOWMENT*, 1.

LEGAL TENDER NOTES.

*See BILLS OF EXCHANGE*.

LEGACY.

*See Leitch v. Wells*, 687.

LEGISLATURE.

It is competent for the legislature to repeal an existing law, absolutely, or continue it in force, as to proceedings commenced under it, or to substitute a new law in its place and direct that all future proceedings in the progress of an action shall be governed by such new law. *The Tribune Association v. The Mayor, &c. of New York*, 240

*See STREETS*, 7.

LIBEL.

1. Where the words used in an alleged libel *ex necessitate* expose the plaintiff to public ridicule or reproach, no explanation or application of the language employed is required; but when they are at all susceptible of an innocent construction, a complaint alleging that the publication tends to blacken and injure the reputation of the plaintiff and expose him to public hatred, contempt and ridicule, cannot be sustained, without an in-

*nundo* explanatory of the ambiguous words. *Mors v. Bennett*, 229

2. A charge that a prostitute is under the patronage or protection of the plaintiff does not necessarily impute moral guilt; and where in a complaint upon such a charge, there was no allegation that the writer of the alleged libel intended to impute such guilt to the plaintiff; *it was held* that the complaint was fatally defective in not containing an *innuendo*. *SUTHERLAND, J. dissented.* §
3. Where the words are so ambiguous that they may be understood in an innocent sense, the mere allegation of malicious intention is not sufficient. *Per LEONARD, J.* §

### LIEN.

*See SHIPS AND VESSELS*, 7, 9, 10.

### LIMITATIONS, STATUTE OF.

To a proceeding under section 875 of the Code, for the purpose of having the defendant adjudged to be bound by a prior judgment entered in the action, after service of process upon his former partner and co-defendant, only, who allowed judgment to be entered for want of an answer, the statute of limitations cannot be set up as a defense, although it had run against the demand before the service of process upon the partner. *Berlin v. Hall*, 442

*See RAILROAD COMPANY.*

## M

### MALICE.

*See MALICIOUS PROSECUTION.*

### MALICIOUS PROSECUTION.

1. To maintain an action for a malicious prosecution, the plaintiff must prove, 1st. That the defendant instigated the prosecution against the plaintiff; 2d. That such prosecution was without probable cause; 3d. That
- it was accompanied with malice, and terminated favorably to the party prosecuted. *Miller v. Milligan*, 80
2. Malice, and a want of probable cause for the former suit, must both be alleged and proved. If there was probable cause, the action cannot be maintained, even though the prosecution complained of was malicious. §
3. Want of probable cause cannot be inferred from any degree of malice which may be shown. §
4. If there is an absence of proof to show that the defendant was the real prosecutor in the former suit; or if he was, that he was without evidence or circumstances justifying a reasonable suspicion of the truth of the charge then made, the plaintiff should be nonsuited, and has no legal right to ask a submission of the facts to the jury. §
5. Whether or not the defendant instigated the prosecution complained of, against the plaintiff, is a question of fact for the jury; and if there is any evidence whatever, upon that point, however slight it may be, the court is not authorized to dismiss the complaint and take the case from the jury. §
6. What constitutes probable cause. It does not depend upon the actual guilt or innocence of the accused, but upon the belief of the prosecutor concerning such guilt or innocence. §
7. The real question is, whether the defendant had reasonable ground for believing that the plaintiff was guilty of the charge made against him. This belief may be founded upon facts within the knowledge of the party, or upon information, derived from other persons. §
8. If he has positive proof of the facts, in the affidavit of another, and he believes the truth of that person's statement, and proceeds against the plaintiff upon that proof, and under a belief in its truthfulness, he will be deemed to have had probable cause for so doing. §
9. It is sufficient that such information was furnished to the defendant,

as of itself would authorize and justify his action. The force and efficacy of the information will not be diminished by the introduction of evidence to show probable cause for the defendant's action, upon other and different grounds. *ib*

10. If the testimony on the trial is conflicting and contradictory and cannot be well reconciled, the question whether there was probable cause should be submitted to the jury. *ib*

### MARRIAGE.

1. The Supreme Court has no inherent power to declare a marriage contract void, or to decree a limited or an absolute divorce. Whatever power it possesses is given by statute; and it can exercise no power, on the subject of divorce, except what is expressly specified in the statute. *Peugnet v. Phelps*, 566
2. The court has no jurisdiction to declare a marriage void, on the ground that a decree for divorce was obtained against the defendant by her former husband, for adultery; in which decree she was forbidden to marry again until her said husband should be dead; and that in disobedience of this provision she and the present plaintiff went to another state and were there married. *ib*

*See* HUSBAND AND WIFE.

### MINORS.

*See* ENLISTED MINORS.

### MISJOINDER.

*See* EJECTMENT, 1.

### MISTAKE.

*See* EQUITY.

### MORTGAGE.

1. The legal effect of an assignment of a mortgage from the mortgagee to the mortgagor is to extinguish

it, so as to let in subsequent liens. *Moore v. Hamilton*, 120

2. The sale of lands under a statutory foreclosure of a mortgage is void where there are no bidders present at the sale except the auctioneer, who bids in the property on behalf of the mortgagee. *Campbell v. Swan*, 109

3. Whether a statutory foreclosure of a mortgage operates to bar an *equitable* interest in the land, unless such interest is specified in the statute as entitling the owner of it to notice of the foreclosure, except in favor of *bona fide* purchasers without notice of such equitable interest? *Quare. ib*

4. Where it did not appear, by the affidavits on file, that notice of a statutory foreclosure of a mortgage was served upon the mortgagor; *Held* that it was ineffectual to transfer the legal title to the plaintiff, who purchased at the sale. *Dwight v. Phillips*, 118

5. Where the affidavits on file showed service by mail, on the mortgagor, at a particular place, without stating it to be the place of his residence; *Held* that the omission was fatal, and could not be supplied by an amendment on the trial which involved the validity of the foreclosure. *ib*

6. The statutory proceedings to foreclose a mortgage are not *proceedings in court*, so as to authorize the court to supply omissions or remedy defects in the affidavits. *ib*

7. *It seems* that the rights of a *prior purchaser*, in possession of lands under an executory contract of sale, are not affected by the statutory foreclosure of a subsequent mortgage, although he is served with notice of sale. *ib*

8. *It seems* such purchaser can safely make payments on the contract, to his vendor, until he has actual notice of the subsequent mortgage. *ib*

## N

### NEGLIGENCE.

One digging a hole in a public street, and leaving the same open and un-

protected or unguarded, is liable for injuries to others, arising from his negligence. *Bliss v. Schaub*, 339

See CARRIERS, 1.

### NEW TRIAL.

See CRIMINAL LAW, 24.  
PRACTICE, 13, 14, 15.

### NEW YORK, (CITY OF.)

1. The act of the legislature of 1866, (*Laws of 1866, vol. 2, p. 2070, § 10.*) which provides that no judgment in actions upon contracts shall be entered by default or otherwise, in any court, against the corporation of New York, "except upon proofs in open court that the amount sought to be recovered in said judgment still remains unexpended in the city treasury to the credit of the appropriation to the specific object or purpose upon which the claim sued for is founded," applies to actions commenced prior to its passage, as well as to those thereafter to be commenced. *The Tribune Association v. The Mayor, &c. of New York*, 240
2. The act of 1866 does not affect the contract. It does not apply to the debt, but to the remedy. It delays the plaintiff's recovery until an appropriation to cover the claim is made. 33
3. Where, in an action against the corporation of New York, for work and labor, the defendants in their answer, admit the performance of the work and labor, and that a sum specified is due, the plaintiff will not be allowed to take judgment for the amount admitted to be due, unless evidence is furnished that a sufficient amount of the appropriation to the specific object, to pay the claim, remains unexpended, at the time of the application. 33

See CRIMINAL LAW, 6.

### NEW YORK, (STATE OF.)

1. The grant to the state of New York, by the third article of the compact

or treaty between that state and the state of New Jersey, made in 1833, of exclusive jurisdiction over all the waters of the bay of New York, and all the waters of the Hudson river, and of and over the lands covered by said waters, to low water mark on the New Jersey shore, subject to the right of property therein granted to New Jersey, conferred upon the state of New York full power and authority to preserve the river and bay from injury by encroachments from strangers acting without authority. *The People v. The Central Railroad of New Jersey*, 478

2. The jurisdiction given to the state of New York, by that article, is not the mere right to serve process either civil or criminal, but is the jurisdiction granted by one sovereign power to another; and in that sense it means the right of exercising authority—of governing and controlling. 33
3. The exclusive jurisdiction in the state of New York, over the waters of the Hudson river, and over the land under the water, gives a right of property therein, sufficient to maintain an action for an encroachment thereon, by erecting docks and piers connected with the main land; notwithstanding the fee of a portion of the land is vested in the state of New Jersey. 33
4. The boundaries of the state of New York extend to low water mark on the New Jersey shore; and the county of New York, on its western boundary extends to the west bounds of the state. 33

See JURISDICTION.

## O

### OFFICER.

1. When an officer becomes satisfied that there was a want of jurisdiction in the court issuing the process, he is not bound to act under it, and if sued for a neglect of duty, he may set up the invalidity of the process as a defense, even though he has already collected a portion of the

amount specified therein, and made a return thereof. *Tucker v. Malloy*, 85

2. He has a right, under such circumstances, to suspend action at any time, and his return of a partial collection of the execution does not create an estoppel. 3

*See* DESERTERS.

## P

### PARTES.

*See* WITNESS.

### PARTNERSHIP.

The mere fact that a check, paid out by a member of a firm, is in the name of the firm, is not sufficient notice to the parties receiving it that it is partnership property; nor enough to put them on inquiry before crediting the amount to the private account of the partner of whom they receive it. *Stirling v. Jaudon*, 459

### PAYMENT.

*See* BILLS OF EXCHANGE.

### PLEADING.

*See* ANSWER.  
USURY.

### PLEDGE.

*See* AGREEMENT, 5.

### PRACTICE.

1. The death of one of the plaintiffs, and the substitution of his successor in interest, pending a reference of the action, does not operate to supersede the order of reference, or invalidate the prior proceedings. The plaintiffs, in such a case, are entitled to the benefit of the prior proceedings already had in the action, includ-

ing the order of reference, when such order has been duly entered, whether by consent of the parties or upon motion in actions which are referable without such consent. *Moore v. Hamilton*, 120

2. Where, in an action to recover a sum claimed by the plaintiff to be due to him, on the ground of an omitted credit, the defendant simply interposes the defenses of a general denial, and payment, and under the issues thus framed, the parties have investigated the whole case, on the trial, without objection, the defendant cannot afterwards be allowed to say it is not a case, upon the pleadings, for examining the question of fraud or mistake. *Hutchinson v. The Market Bank of Troy*, 302

3. Where, upon a trial at the circuit, the judge, after submitting questions of fact to the jury, directs that the exceptions be heard in the first instance at the general term, on the hearing at general term the court has nothing to do with the findings of fact; and even though erroneous it cannot interfere to correct them. *Dickerson v. Wason*, 412

4. The judge at the circuit cannot direct a case to be reviewed and heard at the general term in the first instance, if there are questions of fact to be examined, so far as relates to such questions. 3

5. Where the judge submitted several questions to the jury, although he told them there was no conflict of evidence in the case, and gave as a reason why he could not decide the case as a matter of law that it was the province of the jury not only to determine as to the credibility of witnesses, where there was a conflict of evidence, but to determine the weight of circumstances as evidence; it was held that such a rule, if there was no conflict of evidence to call in question the credibility of witnesses, or to pass upon the weight of testimony, was clearly erroneous. 3

6. Where a corporation is the defendant, the plaintiff cannot have an order for the examination of the defendant as a witness, by its president and

- secretary. *Goodyear v. The Phœnix Rubber Company*, 522
7. The 890th and 891st sections of the Code refer to the examination of parties not of the agents, officers or servants of parties to a suit. It was not the intention of the legislature to authorize the examination of a corporation as a witness. 53
8. In an action for an accounting, it is premature to take the examination of witnesses until it is decided that the plaintiff is entitled to an accounting. 53
9. An action commenced in the Supreme Court, by one foreign corporation against another, cannot be removed for trial, into the Circuit Court of the United States, under the act of Congress of 1789. *Ayres v. The Western Railroad Corporation*, 182
10. But where the assignee of a foreign corporation, suing another foreign corporation, is a citizen of this state, the action may be removed, provided the claim is of such a nature that the United States court can take cognizance of it. 53
11. Section 286 of the Code does not authorize the examination of a person who, on being applied to by the sheriff, does not refuse to give the certificate therein mentioned, but gives the only certificate that he can give, viz. that the defendant in the attachment suit has an interest, as a special partner, in his firm, the amount of which will depend on the liquidation of the affairs of the partnership. *Reynolds v. Fisher*, 146
12. That section allows an examination only when the party applied to by the sheriff refuses to give the certificate. 53
13. Motions for a new trial on the ground of surprise are addressed very much to the sound discretion of the court, and if it satisfactorily appears that, to promote the ends of justice, an opportunity should be presented for the introduction of new testimony, the court will furnish it by setting aside the verdict and granting a new trial. *Tyler v. Hoornbeek*, 197
14. Where the alleged surprise consisted in calling one of the defendants as a witness for the plaintiff, in violation of a promise claimed to have been made by the plaintiff's attorney to the defendant's attorney, by reason of which the latter was unprepared to impeach the witness, as he would have been had such promise not been made; *Held* that the discretion of the court was properly exercised in granting a new trial, on terms. 53
15. The practice of granting new trials at special term by a different judge from the one who heard the cause at the circuit, for legal error on the trial, condemned. *Per* LEONARD, J. *Mars v. Bennett*, 229

## PRINCIPAL AND AGENT.

*See* BILLS OF EXCHANGE, 1.

## PROBABLE CAUSE.

*See* MALICIOUS PROSECUTION.

## PROCESS.

*See* OFFICER.

## PROMISSORY NOTES.

1. Where there is no limitation or restriction as to the manner in which an accommodation note is to be used, the payee has a right to apply it to the payment or security of an antecedent debt, or to sustain his credit in any other way. *Cole v. Sautpough*, 104
2. Where an indorser, though denying notice of protest, in a sworn answer, fails to annex the affidavit required by statute, (8 R. S. 5th ed. 474, § 35,) a notarial certificate of protest may be received in evidence, and is presumptive evidence of the facts stated therein. *Genotry v. Deane*, 148
3. But the defendant may contradict the presumption arising from the certificate, by showing that it is untrue. 53

4. Where the demand of payment is not made by the notary himself, but his certificate is founded on an entry made by his clerk, the act of the clerk is not to be deemed the act of the notary, but may be proven as the act of an individual, and is subject to the ordinary rules of evidence. §
5. Where the clerk who made the demand and gave notice to the indorsers in the name of the notary, is dead, memoranda made by him and entered in the register of the notary, are admissible in evidence, to prove demand and notice. §
6. If there has been no due presentment of a note, or notice of dishonor, and the indorser, after the maturity of the note, supposing himself liable to pay the same, takes security from the maker, that will not amount to a waiver of the objection of want of due presentment and notice. §
7. An admission of liability, by an indorser, after maturity, is never held to be sufficient to overcome the want of demand and notice, without proof that, at the time of the admission, the indorser knew that there was such defective protest. §
8. In the absence of any such proof, although such an admission is not sufficient to establish the liability of the indorser, it is admissible as evidence in connection with the other proof, to be submitted to the jury, upon the question of notice. §
9. A promissory note, or bill, to come within the rules for the protection of the holders of mercantile paper, must be payable absolutely, at some future period, not depending on a contingency, nor payable out of a particular fund. *Skilton v. Richmond*, 428
10. An instrument was drawn in the usual form of a promissory note, except the following clause, viz: "Payable out of and from my separate property and estate, with interest payable quarterly." *Held* that the instrument was not affected by any of the above rules; the words used not referring to a particular fund, but to the whole estate of the maker. Individual promises are always payable from the separate estate of the maker. §
11. *Held, also*, that whether the instrument was subject to the rules of law governing mercantile paper, or not, evidence to show an agreement, contemporaneous with the making or indorsement of the instrument, to extend the time of payment, was not admissible, in an action by the holder, against the maker and indorser. *SUTHERLAND, J. dissented.* §
12. Neither a promissory note, nor any other agreement in writing, can be varied or impaired by parol evidence. §
18. To allow one not a party to a note to recover it, or the value of it, from the payee, would be an anomaly in law. The maker of a note, or any one liable upon it, might maintain such an action, upon proper proof. But to allow a recovery, in such an action, on the ground that the promise contained in the note was to the plaintiff, or to one under whom he claimed title to it, would be a violation of the maxim that written contracts cannot be contradicted by parol evidence. *Per GILBERT, J. Fulton v. Fulton*, 581

*See GIRT.*

## R

### RAILROAD COMPANY.

On the 11th of December, 1852, the common council of the city of New York granted to P. and others the perpetual right to build and run a railroad through the Second avenue, for the transportation of passengers. On the 15th of December, 1852, an agreement, pursuant to the resolutions of the common council, was entered into between the city and the grantees, by which the latter accepted the grant, and, for themselves and "their successors" agreed that they would fulfill and keep the stipulations, conditions, &c. On the 12th of January, 1853, a company called the "Second Avenue Railroad Company," was incorporated under the general railroad act, the directors in which were all the grantees

named in the license, and four other persons. And by an instrument dated January 25, 1868, and signed by all the grantees but one (M.) they assigned the grant to the said railroad company, for the consideration of \$200,000, no part of which was ever paid. The company was organized with the expectation that the grant was to be transferred to it, and the assignment was executed pursuant to the plans of the promoters of the company. In an action by the assignee of the grantees, against the railroad company to recover the consideration agreed to be paid by the latter, for the transfer, *Held*, 1. That the principle that trustees, directors and others, acting in a trust relation, cannot make valid contracts with themselves, affecting the trust estate, was applicable to such assignment. 2. That it was not in the power of the owners of the grant from the city, after having formed themselves into a corporation, and having held out the idea that the corporation owned the right to the road—to name the price for the transfer of the grant from themselves to the company, and to vote as directors of the corporation, to themselves as owners of the grant, the whole capital stock, for the privilege obtained from the city. 3. That the same reasons which prevented the directors of the railroad company from fixing their own value upon the grant, operated to preclude them from making any acknowledgments by resolution signed by their secretary and entered in their minutes, which would have the effect to take the case out of the statute of limitations. 4. That the fact of the grant having been assigned by an instrument under seal, had no bearing upon the question of the statute of limitations; the action not being brought upon the assignment, or for the breach of any agreement under seal, but to recover the price of property conveyed at an agreed or implied valuation. And that more than six years having elapsed, since the sale, the statute was a conclusive bar. *Coleman v. The Second Avenue Railroad Company*, 871

### RAILROADS.

See TAXES AND TAXATION, 7, 8.

### RECEIPT.

See REVENUE STAMPS, 4, 5, 6.

### RECEIVER.

1. Independent of the act of the legislature of 1858, chapter 814, authorizing receivers to treat as void all acts done in fraud of creditors, and making the parties liable to the receivers for the same, receivers of corporations have authority to sue for all moneys due to the company, and for all property improperly disposed of in violation of the rights of either creditors or stockholders, for the purpose of paying the debts and dividing the surplus, if any, among the stockholders. *Osgood v. Layton*, 468
2. An action may be maintained by the receivers of an insolvent corporation against individuals, some of whom are stockholders and some of whom are creditors of the company, to recover from the stockholders a dividend declared on its capital stock and received by them; where it is averred in the complaint that such dividend impaired the capital; that some of the defendants, as creditors, are suing the stockholders to recover from them such dividends; and that the funds so misappropriated are required to pay the debts of the corporation. *ib*

### RELEASE.

- A release discharging a party from "all claims and demands on account of our late copartnership," &c. is not a bar to an action by the releasor, against the releasee, to recover back a sum of money alleged to have been paid by mistake, on a sale by the latter to the former, of his interest in a copartnership. *Rosboro v. Peck*, 92

### RELIGIOUS SOCIETIES.

1. The section of the statute relative to religious corporations, which provides that no board of trustees shall be competent to transact any business "unless the rector, if there be one, and at least one of the church

- wardens, and a majority of the vestrymen, be present; and such rector, if there be one, and if not, then the church warden present, or if both the church wardens be present, then the church warden who shall be called to the chair \* \* \* shall preside at every such meeting or board, *and have the casting vote.*" (1 R. S. 4th ed. 1179, § 1; 2 id. 5th ed. 604,) does not mean that the chairman shall have the casting vote only in case of a tie arising upon the votes of the other members. *The People ex. rel. Remington v. The Rector, &c., of the Church of the Atonement*, 808
2. The term "casting vote," as used in that section, is to be construed as authorizing the chairman, after having first voted with the rest, upon a tie occurring, to give a second vote. *ib*
8. Where, at a meeting of a vestry, both wardens and eight vestrymen being present, and the senior warden in the chair, five voted in favor of engaging the relator as rector, and five, including the presiding officer, in the negative, whereupon the chairman declared the resolution to be lost; *Held* that the chairman must be deemed to have given the casting vote; his declaration that the vote was lost, being equivalent to that; that upon the vote taken, the resolution to call the relator failed for lack of a majority of the votes; and if the chairman voted twice, it was lost, by reason of a majority voting against it. *ib*

#### REVENUE STAMPS.

1. The act of congress, passed in 1864, entitled "An act to provide internal revenue for the support of the government," was intended to impose a stamp duty upon all writs and *other process* issued by a justice of the peace, when the amount claimed is one hundred dollars, or over. It therefore embraces a summons. *Cole v. Bell*, 194
2. Where the notice of appeal from a judgment of a justice of the peace, though specifying several grounds of error, did not specify the want of
- a stamp upon the summons as one of them; *Held* that as the objection involved a question of jurisdiction, it was not waived by the notice of appeal, but could be raised at any time during the progress of the action. *ib*
8. No objection can be urged on the argument of the appeal, to the notice of appeal, because no revenue stamp was put upon it. Such objection can only arise on a motion to dismiss the appeal. *ib*
4. A receipt, such as is usually given by express companies for goods delivered to them to be carried by express, is not an *agreement* within the meaning of the stamp act, requiring a stamp of five cents. *DeBarrs v. Livingston*, 511
5. It is a receipt for the property to be transported, and contains only a notice of the terms on which the company is willing to undertake the transportation. *ib*
6. Such receipt is not subject to any stamp duty, but is excepted in the act of congress of 1865. *ib*
7. Whether congress has the power to declare a contract void for the want of the proper stamp? *Quere.* *ib*
8. An alleged contract was evidenced by a letter, from the defendant to the plaintiff, dated June 18th, and the plaintiff's answer thereto, dated June 20th. The latter, when transmitted, was not stamped, but a copy in the plaintiff's letter book was stamped, and the plaintiff testified that he stamped the defendant's letter of the 18th, on the day after its receipt, and canceled both of the stamps. *Held* that in the absence of any pretense that the defendant ever stamped his letter, or proof that he ever saw the stamp after it was affixed, or assented to the stamping, or the cancellation, this was not such a stamping as the act of congress requires; and consequently the paper was void. *Myers v. Smith*, 614
9. The person executing the document which requires a stamp is the one to affix it; and in any event it can-

not be affixed, nor the cancellation be made, by another party, without the actual knowledge and express or implied assent of the party who issues the paper on which the stamp is placed. *ib*

10. *Held, also*, that the subsequent appearance of the plaintiff before the United States collector, excusing the omission and procuring him to stamp the letters and cancel the stamps, and to sign his certificate to that effect, did not remedy the difficulty in respect to the want of a stamp. *ib*

11. The person who is to appear before the collector and procure the stamping and cancellation is the person who issued the paper and who should have affixed the stamp. He it is upon whom the penalty of \$50 is imposed by section 158 of the act of congress; and he can only be relieved by appearing and making the application and securing the indemnity. *ib*

12. If a party having an interest in a paper shall desire it to be thus stamped for his benefit, he can only effect it by procuring the maker or party to be affected by it to appear before the collector and procure the stamping and cancellation. *ib*

### RIVERS.

1. Where the legislature has asserted for the state the right to control a particular river, and has expressly declared it to be a public highway, by a public act, the state has the unquestionable right to control the use of the river, and to prevent the erection of any bridges or dams, or other works, which will obstruct the free use of the same as a public highway. *The People v. Gutches*, 656

2. Whatever rights the public have, in such a river, the authorities of the state are bound to protect, and a suit for that purpose is properly instituted by the attorney general, in the name of the people. *ib*

3. The public right in a river, upon the assumption that it is not navigable, in fact, is to be regarded simply as that of passage, as in a highway. *ib*

4. By declaring a stream a highway, the state does not acquire any title to the bed of the stream, or any higher or other right than it possesses in, or over ordinary highways upon the land. *ib*

5. If the state owns the bed of a river, or if it be a navigable river, in fact, then the law laid down in *The People v. The Canal Appraisers*, (58 N. Y. Rep. 461,) and *The Canal Appraisers v. The People, ex rel. Tibbets*, (17 Wend. 571,) applies to it, and no one can lawfully construct a bridge over it, without the consent of the legislature. *ib*

6. The state government, in this particular, is the guardian of the rights of each and every citizen, which rights consist in an absolute and unqualified privilege, without let or hindrance, at all times freely to navigate any and every of the streams in the state, that is, at any season of the year, or at any stage of water therein, capable of navigation; and particularly so, if the legislature has by special act declared such stream a public highway. *ib*

7. *Held*, in this case that, though the defendants, commissioners of highways, could not be permanently restrained from erecting a bridge over the *Semois river*, as a free bridge, provided it could be constructed in such a manner as not to interfere with the free navigation of said river, if it should turn out upon the trial that the said river is not navigable, in fact, and that the state does not own the bed of the stream; yet that inasmuch as it was asserted on the part of the people that such river was a public navigable river, of the width of thirty-five rods, and of the average depth of eleven feet, and that the state owned the bed of the stream; and it appeared that the existing bridges across the river had been constructed under leave or authority from the legislature; the court ought, in behalf of the public interest, rather to assume that the state had the rights it claimed, till the truth could be otherwise established. An injunction was accordingly granted, to restrain the erection of the proposed bridge, until the hearing.

S

SENECA RIVER.

*See* RIVERS.

SHERIFF.

*See* CRIMINAL LAW, 1.

SHIPS AND VESSELS.

1. In an action against the owners of a ship, for goods furnished to the ship, on the order of the captain, the plaintiff must give some proof to show that the articles furnished were necessities. *Ford v. Creaker*, 142
2. The rule adopted in the courts of this country, while it admits the right to confine the supplies thus furnished to such as are necessary, leaves the decision as to what is necessary rather to the captain than to the creditor. *ib*
3. Tradesmen are not called upon, before delivering supplies for a vessel on the order of the captain, to examine whether each article ordered is actually necessary to enable the vessel to make the voyage. If it is proper that they should be ordered on account of, and for the use of, the vessel, the vendors may rely on the captain to decide whether they are necessary or not; and his order for the goods on that account is sufficient. *ib*
4. In the absence of any proof that any part of the plaintiff's account was furnished for the private use of the captain, evidence that the supplies were ordered by the captain for the use and on account of the vessel, and that they were furnished, is *prima facie* sufficient to charge the owners. *ib*
5. A bottomry bond is valid although it includes the personal liability of the master. *Kelly v. Cushing*, 269
6. The master is personally liable on the bond, in such a case, for the debt secured; but not unless the vessel arrives. *ib*

7. The master may bind the freight, as well as the vessel, in such a bond, by express stipulation; but in the absence of such a stipulation, the bond will create no lien on the freight, directly. *ib*
8. Where the money secured by a bottomry bond is not paid, the lender, on proof of the insufficiency of the vessel as security, and that the pecuniary responsibility of the master is doubtful, may have an injunction to restrain the owners of the vessel from collecting the freight of the cargo brought by the vessel on her homeward voyage. *ib*
9. The master of a vessel has a lien on the cargo and freight, for advances made, or liabilities incurred, by him in a foreign port, for the repairs and supplies of the vessel. *ib*
10. And when the vessel is not of sufficient value to secure the debt, and the master is not responsible, the creditor is entitled to have this lien of the master enforced for the payment of the debt incurred for repairs. *CLEERE, J. dissented. ib*

SLANDER.

1. Where it is claimed, in an action for slander, that the explanatory matter which accompanied the slanderous words, so qualified them that the crime in question was not imputed, it must be shown that the explanation not only accompanied the words, but that they were sufficiently explicit to enable those who heard the same reasonably to understand to what the words uttered referred; and that the crime which the words, standing alone and taken in their natural and ordinary meaning, would impute, was not intended to be charged. *Van Albin v. Calor*, 58
2. The party who utters words imputing to another crime, must be presumed to intend what the words naturally import; and it is but just to require that the explanation be made sufficiently definite to prevent an erroneous impression unfavorable to the party against whom the charge is made. *ib*

*quando* explanatory of the ambiguous words. *More v. Bennett*, 229

2. A charge that a prostitute is under the patronage or protection of the plaintiff does not necessarily impute moral guilt; and where in a complaint upon such a charge, there was no allegation that the writer of the alleged libel intended to impute such guilt to the plaintiff; it was held that the complaint was fatally defective in not containing an innuendo. *SUTHERLAND, J.* dissented. §
3. Where the words are so ambiguous that they may be understood in an innocent sense, the mere allegation of malicious intention is not sufficient. *Per LEONARD, J.* §

### LIEN.

*See SHIPS AND VESSELS*, 7, 9, 10.

### LIMITATIONS, STATUTE OF.

To a proceeding under section 375 of the Code, for the purpose of having the defendant adjudged to be bound by a prior judgment entered in the action, after service of process upon his former partner and co-defendant, only, who allowed judgment to be entered for want of an answer, the statute of limitations cannot be set up as a defense, although it had run against the demand before the service of process upon the partner. *Bartie v. Hall*, 442

*See RAILROAD COMPANY.*

### M

### MALICE.

*See MALICIOUS PROSECUTION.*

### MALICIOUS PROSECUTION.

1. To maintain an action for a malicious prosecution, the plaintiff must prove, 1st. That the defendant instigated the prosecution against the plaintiff; 2d. That such prosecution was without probable cause; 3d. That

it was accompanied with malice, and terminated favorably to the party prosecuted. *Miller v. Milligan*, 80

2. Malice, and a want of probable cause for the former suit, must both be alleged and proved. If there was probable cause, the action cannot be maintained, even though the prosecution complained of was malicious. §
3. Want of probable cause cannot be inferred from any degree of malice which may be shown. §
4. If there is an absence of proof to show that the defendant was the real prosecutor in the former suit; or if he was, that he was without evidence or circumstances justifying a reasonable suspicion of the truth of the charge then made, the plaintiff should be nonsuited, and has no legal right to ask a submission of the facts to the jury. §
5. Whether or not the defendant instigated the prosecution complained of, against the plaintiff, is a question of fact for the jury; and if there is any evidence whatever, upon that point, however slight it may be, the court is not authorized to dismiss the complaint and take the case from the jury. §
6. What constitutes probable cause. It does not depend upon the actual guilt or innocence of the accused, but upon the belief of the prosecutor concerning such guilt or innocence. §
7. The real question is, whether the defendant had reasonable ground for believing that the plaintiff was guilty of the charge made against him. This belief may be founded upon facts within the knowledge of the party, or upon information, derived from other persons. §
8. If he has positive proof of the facts, in the affidavit of another, and he believes the truth of that person's statement, and proceeds against the plaintiff upon that proof, and under a belief in its truthfulness, he will be deemed to have had probable cause for so doing. §
9. It is sufficient that such information was furnished to the defendant,

as of itself would authorize and justify his action. The force and efficacy of the information will not be diminished by the introduction of evidence to show probable cause for the defendant's action, upon other and different grounds. *ib*

10. If the testimony on the trial is conflicting and contradictory and cannot be well reconciled, the question whether there was probable cause should be submitted to the jury. *ib*

### MARRIAGE.

1. The Supreme Court has no inherent power to declare a marriage contract void, or to decree a limited or an absolute divorce. Whatever power it possesses is given by statute; and it can exercise no power, on the subject of divorce, except what is expressly specified in the statute. *Paugnet v. Phelps*, 566
2. The court has no jurisdiction to declare a marriage void, on the ground that a decree for divorce was obtained against the defendant by her former husband, for adultery; in which decree she was forbidden to marry again until her said husband should be dead; and that in disobedience of this provision she and the present plaintiff went to another state and were there married. *ib*

*See* HUSBAND AND WIFE.

### MINORS.

*See* EXLISTED MINORS.

### MISJOINDER.

*See* EJECMENT, 1.

### MISTAKE.

*See* EQUITY.

### MORTGAGE.

1. The legal effect of an assignment of a mortgage from the mortgagee to the mortgagor is to extinguish

it, so as to let in subsequent liens. *Moore v. Hamilton*, 120

2. The sale of lands under a statutory foreclosure of a mortgage is void where there are no bidders present at the sale except the auctioneer, who bids in the property on behalf of the mortgagee. *Campbell v. Swan*, 109

3. Whether a statutory foreclosure of a mortgage operates to bar an equitable interest in the land, unless such interest is specified in the statute as entitling the owner of it to notice of the foreclosure, except in favor of bona fide purchasers without notice of such equitable interest? *Quare. ib*

4. Where it did not appear, by the affidavits on file, that notice of a statutory foreclosure of a mortgage was served upon the mortgagor; *Held* that it was ineffectual to transfer the legal title to the plaintiff, who purchased at the sale. *Dwight v. Phillips*, 116

5. Where the affidavits on file showed service by mail, on the mortgagor, at a particular place, without stating it to be the place of his residence; *Held* that the omission was fatal, and could not be supplied by an amendment on the trial which involved the validity of the foreclosure. *ib*

6. The statutory proceedings to foreclose a mortgage are not proceedings in court, so as to authorize the court to supply omissions or remedy defects in the affidavits. *ib*

7. *It seems* that the rights of a prior purchaser, in possession of lands under an executory contract of sale, are not affected by the statutory foreclosure of a subsequent mortgage, although he is served with notice of sale. *ib*

8. *It seems* such purchaser can safely make payments on the contract, to his vendor, until he has actual notice of the subsequent mortgage. *ib*

## N

### NEGLIGENCE.

One digging a hole in a public street, and leaving the same open and un-

protected or unguarded, is liable for injuries to others, arising from his negligence. *Bliss v. Schaub*, 889

See CARRIERS, 1.

### NEW TRIAL.

See CRIMINAL LAW, 24.

PRACTICE, 13, 14, 15.

### NEW YORK, (CITY OF.)

1. The act of the legislature of 1866, (*Laws of 1866, vol. 2, p. 2070, § 10.*) which provides that no judgment in actions upon contracts shall be entered by default or otherwise, in any court, against the corporation of New York, "except upon proofs in open court that the amount sought to be recovered in said judgment still remains unexpended in the city treasury to the credit of the appropriation to the specific object or purpose upon which the claim sued for is founded," applies to actions commenced prior to its passage, as well as to those thereafter to be commenced. *The Tribune Association v. The Mayor, &c. of New York*, 240
2. The act of 1866 does not affect the contract. It does not apply to the debt, but to the remedy. It delays the plaintiff's recovery until an appropriation to cover the claim is made. *ib*
8. Where, in an action against the corporation of New York, for work and labor, the defendants in their answer, admit the performance of the work and labor, and that a sum specified is due, the plaintiff will not be allowed to take judgment for the amount admitted to be due, unless evidence is furnished that a sufficient amount of the appropriation to the specific object, to pay the claim, remains unexpended, at the time of the application. *ib*

See CRIMINAL LAW, 6.

### NEW YORK, (STATE OF.)

1. The grant to the state of New York, by the third article of the compact

or treaty between that state and the state of New Jersey, made in 1833, of exclusive jurisdiction over all the waters of the bay of New York, and all the waters of the Hudson river, and of and over the lands covered by said waters, to low water mark on the New Jersey shore, subject to the right of property therein granted to New Jersey, conferred upon the state of New York full power and authority to preserve the river and bay from injury by encroachments from strangers acting without authority. *The People v. The Central Railroad of New Jersey*, 478

2. The jurisdiction given to the state of New York, by that article, is not the mere right to serve process either civil or criminal, but is the jurisdiction granted by one sovereign power to another; and in that sense it means the right of exercising authority—of governing and controlling. *ib*
3. The exclusive jurisdiction in the state of New York, over the waters of the Hudson river, and over the land under the water, gives a right of property therein, sufficient to maintain an action for an encroachment thereon, by erecting docks and piers connected with the main land; notwithstanding the fee of a portion of the land is vested in the state of New Jersey. *ib*
4. The boundaries of the state of New York extend to low water mark on the New Jersey shore; and the county of New York, on its western boundary extends to the west bounds of the state. *ib*

See JURISDICTION.

## O

### OFFICER.

1. When an officer becomes satisfied that there was a want of jurisdiction in the court issuing the process, he is not bound to act under it, and if sued for a neglect of duty, he may set up the invalidity of the process as a defense, even though he has already collected a portion of the

amount specified therein, and made a return thereof. *Tucker v. Malloy*, 85

2. He has a right, under such circumstances, to suspend action at any time, and his return of a partial collection of the execution does not create an estoppel. *ib*

*See* DESERTERS.

## P

### PARTES.

*See* WITNESS.

### PARTNERSHIP.

The mere fact that a check, paid out by a member of a firm, is in the name of the firm, is not sufficient notice to the parties receiving it that it is partnership property; nor enough to put them on inquiry before crediting the amount to the private account of the partner of whom they receive it. *Stirling v. Jaudon*, 459

### PAYMENT.

*See* BILLS OF EXCHANGE.

### PLEADING.

*See* ANSWER.  
USURY.

### PLEDGE.

*See* AGREEMENT, 5.

### PRACTICE.

1. The death of one of the plaintiffs, and the substitution of his successor in interest, pending a reference of the action, does not operate to supersede the order of reference, or invalidate the prior proceedings. The plaintiffs, in such a case, are entitled to the benefit of the prior proceedings already had in the action, includ-

ing the order of reference, when such order has been duly entered, whether by consent of the parties or upon motion in actions which are referable without such consent. *Moore v. Hamilton*, 120

2. Where, in an action to recover a sum claimed by the plaintiff to be due to him, on the ground of an omitted credit, the defendant simply interposes the defenses of a general denial, and payment, and under the issues thus framed, the parties have investigated the whole case, on the trial, without objection, the defendant cannot afterwards be allowed to say it is not a case, upon the pleadings, for examining the question of fraud or mistake. *Hutchinson v. The Market Bank of Troy*, 302

3. Where, upon a trial at the circuit, the judge, after submitting questions of fact to the jury, directs that the exceptions be heard in the first instance at the general term, on the hearing at general term the court has nothing to do with the findings of fact; and even though erroneous it cannot interfere to correct them. *Dickerson v. Wason*, 412

4. The judge at the circuit cannot direct a case to be reviewed and heard at the general term in the first instance, if there are questions of fact to be examined, so far as relates to such questions. *ib*

5. Where the judge submitted several questions to the jury, although he told them there was no conflict of evidence in the case, and gave as a reason why he could not decide the case as a matter of law that it was the province of the jury not only to determine as to the credibility of witnesses, where there was a conflict of evidence, but to determine the weight of circumstances as evidence; it was held that such a rule, if there was no conflict of evidence to call in question the credibility of witnesses, or to pass upon the weight of testimony, was clearly erroneous. *ib*

6. Where a corporation is the defendant, the plaintiff cannot have an order for the examination of the defendant as a witness, by its president and

- secretary. *Goodyear v. The Phoenix Rubber Company*, 522
7. The 890th and 891st sections of the Code refer to the examination of parties not of the agents, officers or servants of parties to a suit. It was not the intention of the legislature to authorize the examination of a corporation as a witness. *ib*
8. In an action for an accounting, it is premature to take the examination of witnesses until it is decided that the plaintiff is entitled to an accounting. *ib*
9. An action commenced in the Supreme Court, by one foreign corporation against another, cannot be removed for trial, into the Circuit Court of the United States, under the act of Congress of 1789. *Ayres v. The Western Railroad Corporation*, 182
10. But where the assignee of a foreign corporation, suing another foreign corporation, is a citizen of this state, the action may be removed, provided the claim is of such a nature that the United States court can take cognizance of it. *ib*
11. Section 286 of the Code does not authorize the examination of a person who, on being applied to by the sheriff, does not refuse to give the certificate therein mentioned, but gives the only certificate that he can give, viz. that the defendant in the attachment suit has an interest, as a special partner, in his firm, the amount of which will depend on the liquidation of the affairs of the partnership. *Reynolds v. Fisher*, 146
12. That section allows an examination only when the party applied to by the sheriff refuses to give the certificate. *ib*
13. Motions for a new trial on the ground of surprise are addressed very much to the sound discretion of the court, and if it satisfactorily appears that, to promote the ends of justice, an opportunity should be presented for the introduction of new testimony, the court will furnish it by setting aside the verdict and granting a new trial. *Tyler v. Hoornbeek*, 197
14. Where the alleged surprise consisted in calling one of the defendants as a witness for the plaintiff, in violation of a promise claimed to have been made by the plaintiff's attorney to the defendant's attorney, by reason of which the latter was unprepared to impeach the witness, as he would have been had such promise not been made; *Held* that the discretion of the court was properly exercised in granting a new trial, on terms. *ib*
15. The practice of granting new trials at special term by a different judge from the one who heard the cause at the circuit, for legal error on the trial, condemned. *Per LEONARD, J. Mars v. Bennett*, 229

## PRINCIPAL AND AGENT.

*See* BILLS OF EXCHANGE, 1.

## PROBABLE CAUSE.

*See* MALICIOUS PROSECUTION.

## PROCESS.

*See* OFFICER.

## PROMISSORY NOTES.

1. Where there is no limitation or restriction as to the manner in which an accommodation note is to be used, the payee has a right to apply it to the payment or security of an antecedent debt, or to sustain his credit in any other way. *Cole v. Southampton*, 104
2. Where an indorser, though denying notice of protest, in a sworn answer, fails to annex the affidavit required by statute, (3 R. S. 5th ed. 474, § 85,) a notarial certificate of protest may be received in evidence, and is presumptive evidence of the facts stated therein. *Gowtry v. Deane*, 148
3. But the defendant may contradict the presumption arising from the certificate, by showing that it is untrue. *ib*

4. Where the demand of payment is not made by the notary himself, but his certificate is founded on an entry made by his clerk, the act of the clerk is not to be deemed the act of the notary, but may be proven as the act of an individual, and is subject to the ordinary rules of evidence. §
5. Where the clerk who made the demand and gave notice to the indorsers in the name of the notary, is dead, memoranda made by him and entered in the register of the notary, are admissible in evidence, to prove demand and notice. §
6. If there has been no due presentment of a note, or notice of dishonor, and the indorser, after the maturity of the note, supposing himself liable to pay the same, takes security from the maker, that will not amount to a waiver of the objection of want of due presentment and notice. §
7. An admission of liability, by an indorser, after maturity, is never held to be sufficient to overcome the want of demand and notice, without proof that, at the time of the admission, the indorser knew that there was such defective protest. §
8. In the absence of any such proof, although such an admission is not sufficient to establish the liability of the indorser, it is admissible as evidence in connection with the other proof, to be submitted to the jury, upon the question of notice. §
9. A promissory note, or bill, to come within the rules for the protection of the holders of mercantile paper, must be payable absolutely, at some future period, not depending on a contingency, nor payable out of a particular fund. *Skilton v. Richmond*, 428
10. An instrument was drawn in the usual form of a promissory note, except the following clause, viz: "Payable out of and from my separate property and estate, with interest payable quarterly." *Held* that the instrument was not affected by any of the above rules; the words used not referring to a particular fund, but to the whole estate of the maker. Individual promises are always payable from the separate estate of the maker. §
11. *Held, also*, that whether the instrument was subject to the rules of law governing mercantile paper, or not, evidence to show an agreement, contemporaneous with the making or indorsement of the instrument, to extend the time of payment, was not admissible, in an action by the holder, against the maker and indorser. *SUTHERLAND, J. dissented.* §
12. Neither a promissory note, nor any other agreement in writing, can be varied or impaired by parol evidence. §
18. To allow one not a party to a note to recover it, or the value of it, from the payee, would be an anomaly in law. The maker of a note, or any one liable upon it, might maintain such an action, upon proper proof. But to allow a recovery, in such an action, on the ground that the promise contained in the note was to the plaintiff, or to one under whom he claimed title to it, would be a violation of the maxim that written contracts cannot be contradicted by parol evidence. *Per GILBERT, J. Fulton v. Fulton*, 581

See GIFT.

## R

### RAILROAD COMPANY.

On the 11th of December, 1852, the common council of the city of New York granted to P. and others the perpetual right to build and run a railroad through the Second avenue, for the transportation of passengers. On the 15th of December, 1852, an agreement, pursuant to the resolutions of the common council, was entered into between the city and the grantees, by which the latter accepted the grant, and, for themselves and "their successors" agreed that they would fulfill and keep the stipulations, conditions, &c. On the 12th of January, 1853, a company called the "Second Avenue Railroad Company," was incorporated under the general railroad act, the directors in which were all the grantees

named in the license, and four other persons. And by an instrument dated January 25, 1858, and signed by all the grantees but one (M.) they assigned the grant to the said railroad company, for the consideration of \$200,000, no part of which was ever paid. The company was organized with the expectation that the grant was to be transferred to it, and the assignment was executed pursuant to the plans of the promoters of the company. In an action by the assignee of the grantees, against the railroad company to recover the consideration agreed to be paid by the latter, for the transfer, *Held*, 1. That the principle that trustees, directors and others, acting in a trust relation, cannot make valid contracts with themselves, affecting the trust estate, was applicable to such assignment. 2. That it was not in the power of the owners of the grant from the city, after having formed themselves into a corporation, and having held out the idea that the corporation owned the right to the road—to name the price for the transfer of the grant from themselves to the company, and to vote as directors of the corporation, to themselves as owners of the grant, the whole capital stock, for the privilege obtained from the city. 3. That the same reasons which prevented the directors of the railroad company from fixing their own value upon the grant, operated to preclude them from making any acknowledgments by resolution signed by their secretary and entered in their minutes, which would have the effect to take the case out of the statute of limitations. 4. That the fact of the grant having been assigned by an instrument under seal, had no bearing upon the question of the statute of limitations; the action not being brought upon the assignment, or for the breach of any agreement under seal, but to recover the price of property conveyed at an agreed or implied valuation. And that more than six years having elapsed, since the sale, the statute was a conclusive bar. *Coleman v. The Second Avenue Railroad Company*, 871

## RAILROADS.

See TAXES AND TAXATION, 7, 8.

## RECEIPT.

See REVENUE STAMPS, 4, 5, 6.

## RECEIVER.

1. Independent of the act of the legislature of 1858, chapter 814, authorizing receivers to treat as void all acts done in fraud of creditors, and making the parties liable to the receivers for the same, receivers of corporations have authority to sue for all moneys due to the company, and for all property improperly disposed of in violation of the rights of either creditors or stockholders, for the purpose of paying the debts and dividing the surplus, if any, among the stockholders. *Osgood v. Laytin*, 468
2. An action may be maintained by the receivers of an insolvent corporation against individuals, some of whom are stockholders and some of whom are creditors of the company, to recover from the stockholders a dividend declared on its capital stock and received by them; where it is averred in the complaint that such dividend impaired the capital; that some of the defendants, as creditors, are suing the stockholders to recover from them such dividends; and that the funds so misappropriated are required to pay the debts of the corporation. *id*

## RELEASE.

- A release discharging a party from "all claims and demands on account of our late copartnership," &c. is not a bar to an action by the releasor, against the releasee, to recover back a sum of money alleged to have been paid by mistake, on a sale by the latter to the former, of his interest in a copartnership. *Roobore v. Peak*, 92

## RELIGIOUS SOCIETIES.

1. The section of the statute relative to religious corporations, which provides that no board of trustees shall be competent to transact any business "unless the rector, if there be one, and at least one of the church

- wardens, and a majority of the vestrymen, be present; and such rector, if there be one, and if not, then the church warden present, or if both the church wardens be present, then the church warden who shall be called to the chair \* \* \* shall preside at every such meeting or board, and have the casting vote," (1 *R. S.* 4th ed. 1179, § 1; 2 *id.* 5th ed. 604,) does not mean that the chairman shall have the casting vote only in case of a tie arising upon the votes of the other members. *The People ex. rel. Remington v. The Rector, &c., of the Church of the Atonement*, 608
2. The term "casting vote," as used in that section, is to be construed as authorizing the chairman, after having first voted with the rest, upon a tie occurring, to give a second vote. 53
3. Where, at a meeting of a vestry, both wardens and eight vestrymen being present, and the senior warden in the chair, five voted in favor of engaging the relator as rector, and five, including the presiding officer, in the negative, whereupon the chairman declared the resolution to be lost; *Held* that the chairman must be deemed to have given the casting vote; his declaration that the vote was lost, being equivalent to that; that upon the vote taken, the resolution to call the relator failed for lack of a majority of the votes; and if the chairman voted twice, it was lost, by reason of a majority voting against it. 53
- REVENUE STAMPS.**
1. The act of congress, passed in 1864, entitled "An act to provide internal revenue for the support of the government," was intended to impose a stamp duty upon all writs and other process issued by a justice of the peace, when the amount claimed is one hundred dollars, or over. It therefore embraces a summons. *Cole v. Bell*, 194
2. Where the notice of appeal from a judgment of a justice of the peace, though specifying several grounds of error, did not specify the want of a stamp upon the summons as one of them; *Held* that as the objection involved a question of jurisdiction, it was not waived by the notice of appeal, but could be raised at any time during the progress of the action. 53
3. No objection can be urged on the argument of the appeal, to the notice of appeal, because no revenue stamp was put upon it. Such objection can only arise on a motion to dismiss the appeal. 53
4. A receipt, such as is usually given by express companies for goods delivered to them to be carried by express, is not an agreement within the meaning of the stamp act, requiring a stamp of five cents. *DeBarre v. Livingston*, 511
5. It is a receipt for the property to be transported, and contains only a notice of the terms on which the company is willing to undertake the transportation. 53
6. Such receipt is not subject to any stamp duty, but is excepted in the act of congress of 1865. 53
7. Whether congress has the power to declare a contract void for the want of the proper stamp? *Quare*. 53
8. An alleged contract was evidenced by a letter, from the defendant to the plaintiff, dated June 18th, and the plaintiff's answer thereto, dated June 20th. The latter, when transmitted, was not stamped, but a copy in the plaintiff's letter book was stamped, and the plaintiff testified that he stamped the defendant's letter of the 18th, on the day after its receipt, and canceled both of the stamps. *Held* that in the absence of any pretense that the defendant ever stamped his letter, or proof that he ever saw the stamp after it was affixed, or assented to the stamping, or the cancellation, this was not such a stamping as the act of congress requires; and consequently the paper was void. *Myers v. Smith*, 614
9. The person executing the document which requires a stamp is the one to affix it; and in any event it can-

- not be affixed, nor the cancellation be made, by another party, without the actual knowledge and express or implied assent of the party who issues the paper on which the stamp is placed. *ib*
10. *Held, also*, that the subsequent appearance of the plaintiff before the United States collector, excusing the omission and procuring him to stamp the letters and cancel the stamps, and to sign his certificate to that effect, did not remedy the difficulty in respect to the want of a stamp. *ib*
  11. The person who is to appear before the collector and procure the stamping and cancellation is the person who issued the paper and who should have affixed the stamp. He it is upon whom the penalty of \$50 is imposed by section 158 of the act of congress; and he can only be relieved by appearing and making the application and securing the indemnity. *ib*
  12. If a party having an interest in a paper shall desire it to be thus stamped for his benefit, he can only effect it by procuring the maker or party to be affected by it to appear before the collector and procure the stamping and cancellation. *ib*
  4. By declaring a stream a highway, the state does not acquire any title to the bed of the stream, or any higher or other right than it possesses in, or over ordinary highways upon the land. *ib*
  5. If the state owns the bed of a river, or if it be a navigable river, in fact, then the law laid down in *The People v. The Canal Appraisers*, (38 N. Y. Rep. 461,) and *The Canal Appraisers v. The People, ex rel. Tibbette*, (17 Wend. 571,) applies to it, and no one can lawfully construct a bridge over it, without the consent of the legislature. *ib*
  6. The state government, in this particular, is the guardian of the rights of each and every citizen, which rights consist in an absolute and unqualified privilege, without let or hindrance, at all times freely to navigate any and every of the streams in the state, that is, at any season of the year, or at any stage of water therein, capable of navigation; and particularly so, if the legislature has by special act declared such stream a public highway. *ib*
  7. *Held*, in this case that, though the defendants, commissioners of highways, could not be permanently restrained from erecting a bridge over the *Somuch river*, as a free bridge, provided it could be constructed in such a manner as not to interfere with the free navigation of said river, if it should turn out upon the trial that the said river is not navigable, in fact, and that the state does not own the bed of the stream; yet that inasmuch as it was asserted on the part of the people that such river was a public navigable river, of the width of thirty-five rods, and of the average depth of eleven feet, and that the state owned the bed of the stream; and it appeared that the existing bridges across the river had been constructed under leave or authority from the legislature; the court ought, in behalf of the public interest, rather to assume that the state had the rights it claimed, till the truth could be otherwise established. An injunction was accordingly granted, to restrain the erection of the proposed bridge, until the hearing. *ib*

## RIVERS.

1. Where the legislature has asserted for the state the right to control a particular river, and has expressly declared it to be a public highway, by a public act, the state has the unquestionable right to control the use of the river, and to prevent the erection of any bridges or dams, or other works, which will obstruct the free use of the same as a public highway. *The People v. Gutcheson*, 656
2. Whatever rights the public have, in such a river, the authorities of the state are bound to protect, and a suit for that purpose is properly instituted by the attorney general, in the name of the people. *ib*
3. The public right in a river, upon the assumption that it is not navigable, in fact, is to be regarded simply as that of passage, as in a highway. *ib*

S

SENECA RIVER.

*See* RIVERS.

SHERIFF.

*See* CRIMINAL LAW, 1.

SHIPS AND VESSELS.

1. In an action against the owners of a ship, for goods furnished to the ship, on the order of the captain, the plaintiff must give some proof to show that the articles furnished were necessaries. *Ford v. Crocker*, 142
2. The rule adopted in the courts of this country, while it admits the right to confine the supplies thus furnished to such as are necessary, leaves the decision as to what is necessary rather to the captain than to the creditor. *ib*
3. Tradesmen are not called upon, before delivering supplies for a vessel on the order of the captain, to examine whether each article ordered is actually necessary to enable the vessel to make the voyage. If it is proper that they should be ordered on account of, and for the use of, the vessel, the vendors may rely on the captain to decide whether they are necessary or not; and his order for the goods on that account is sufficient. *ib*
4. In the absence of any proof that any part of the plaintiff's account was furnished for the private use of the captain, evidence that the supplies were ordered by the captain for the use and on account of the vessel, and that they were furnished, is *prima facie* sufficient to charge the owners. *ib*
5. A bottomry bond is valid although it includes the personal liability of the master. *Kelly v. Cushing*, 269
6. The master is personally liable on the bond, in such a case, for the debt secured; but not unless the vessel arrives. *ib*

7. The master may bind the freight, as well as the vessel, in such a bond, by express stipulation; but in the absence of such a stipulation, the bond will create no lien on the freight, directly. *ib*
8. Where the money secured by a bottomry bond is not paid, the lender, on proof of the insufficiency of the vessel as security, and that the pecuniary responsibility of the master is doubtful, may have an injunction to restrain the owners of the vessel from collecting the freight of the cargo brought by the vessel on her homeward voyage. *ib*
9. The master of a vessel has a lien on the cargo and freight, for advances made, or liabilities incurred, by him in a foreign port, for the repairs and supplies of the vessel. *ib*
10. And when the vessel is not of sufficient value to secure the debt, and the master is not responsible, the creditor is entitled to have this lien of the master enforced for the payment of the debt incurred for repairs. *CLEKKER, J. dissented. ib*

SLANDER.

1. Where it is claimed, in an action for slander, that the explanatory matter which accompanied the slanderous words, so qualified them that the crime in question was not imputed, it must be shown that the explanation not only accompanied the words, but that they were sufficiently explicit to enable those who heard the same reasonably to understand to what the words uttered referred; and that the crime which the words, standing alone and taken in their natural and ordinary meaning, would impute, was not intended to be charged. *Van Alkin v. Calor*, 58
2. The party who utters words imputing to another crime, must be presumed to intend what the words naturally import; and it is but just to require that the explanation be made sufficiently definite to prevent an erroneous impression unfavorable to the party against whom the charge is made. *ib*

**SPECIFIC PERFORMANCE.***See* COUNTER CLAIM.**STAMPS.***See* REVENUE STAMPS.**STATE.***See* RIVERS.**STATUTE.**

*See* EXECUTORS AND ADMINISTRATORS, 5.  
LEGISLATURE.  
NEW YORK, (CITY OF), 1, 2.

**STOCKS.**

*See* BROKERS.  
*Lotish v. Wells*, 637.

**STREAMS.***See* RIVERS.**STREETS.**

1. In laying out a street, lands may be taken to be used for the purposes of court yards only by the owners of lots of which they form a part; and other premises may be assessed for the expense. *Matter of Widening Bushwick Avenue, Brooklyn*, 9
2. The report of the commissioners, awarding damages for land taken, will not be sent back for correction because of the inadequacy of the awards, unless it appears that there was an error in the principle upon which the commissioners proceeded in making the awards. 10
3. Land may be taken for a street, adjoining its continuous line, to prevent angular pieces of property being left, when authorized by the legislature. *Matter of Widening South Seventh Street, Brooklyn*, 12
4. It is no objection to the report of commissioners of estimate, that one of the commissioners holds the legal estate in a portion of the premises taken for the street. 13

5. It is not necessary for the common council of the city of Brooklyn to specifically direct the corporation counsel to move for the confirmation of the commissioners' report. It is his duty to take all necessary proceedings, by virtue of his office, when the common council have given him notice to carry out the improvements. 13

6. The report of the commissioners, awarding damages for land taken, will not be sent back for correction because of inadequacy of awards, unless it appears that there was an error in the principle upon which they proceeded, in making their awards. 13

7. It is proper for the legislature to provide that in proceedings for opening and widening a street, the expenses incurred under a former act of the legislature for the same purpose be included as a part of the expense. 13

8. The dedication of land, for the purposes of streets, binds the parties interested, though made by commissioners appointed to make partition between the owners. *The People ex. rel. Sale v. The City of Brooklyn*, 211

9. And subsequent conveyances referring to such streets, and including the land to the centre of the street, will be held to convey the land in the street—not as unincumbered property, but as and for the purposes of public streets. 13

*See* BROOKLYN, (CITY OF).  
NEGLECT.

**SUMMARY PROCEEDINGS.***See* LANDLORD AND TENANT, 3 to 8.**SURPRISE.***See* PRACTICE, 13, 14.**SURROGATE.**

*See* EXECUTORS AND ADMINISTRATORS.  
HUSBAND AND WIFE.  
WITNESS.

T

TAXES AND TAXATION.

1. The plaintiff was the owner of a summer residence in one of the towns of Erie county, and a winter residence in the city of Buffalo. He resided in the city with his family, until the month of June, when he went, with his family, to the residence in the country, where they remained during the summer. His principal business was carried on in the city, to which he attended personally, going to his family at night, and returning mornings. The defendants, as assessors of the town where he had his summer residence, in the year 1864, assessed him for personal property, not knowing that he had or claimed any other residence. The tax was levied and collected of the plaintiff on said assessment, and he brought this action to recover the money back. *Held* that the action could not be maintained, even though the assessment was erroneous. *Bell v. Pierce*, 51
2. A steamship company, incorporated under the laws of New York, for the transportation of passengers and freight between New York and Brazil, whose capital is invested in vessels employed for that purpose, and whose office is located in the city of New York, is not exempted from state taxation on its capital, under the constitution of the United States, on the ground that the whole amount is invested in steamships engaged in foreign commerce and in carrying the mails under a contract with the United States. *The People ex rel. The U. S. and Brazil Steamship Co. v. The Commissioners of Taxes*, 157
3. Such an assessment in no way interferes with the power of congress to regulate commerce, either with foreign countries or between the states. 53
4. When the assessors, in their return to a writ of certiorari, state that they had perfected the assessment roll and delivered the same, duly certified, to the supervisor of the town, and that the same was not in their possession or control at the time the writ was served on them, the court will

- dismiss the writ, as to them. *The People v. The Buffalo and State Line Rail Road Co. v. Fredericks*, 178
5. The only questions the court can consider upon certiorari brought to review an assessment under the general tax law, are whether the assessors had jurisdiction to assess the relator, and have kept their proceedings within the bounds of such jurisdiction. 53
6. Assessors are not bound to reduce the value of the property of any party deeming himself aggrieved by their assessment to the amount fixed in his sworn statement and examination before them, but they are to fix the value after such statement is before them, as they may deem just, having in view the general duty to assess property "at its full and true value, as they would appraise the same in payment of a just debt due from a solvent debtor." 53
7. The real estate of railroad companies should be assessed at its value for the purpose to which it has been adapted, and not as mere farming lands; and in estimating the same, the assessors are not bound to consider it as mere land and superstructure isolated in their town from the other parts of the road. They are entitled to estimate the value of that part of the real estate within their jurisdiction which contributes to make up a complete and useful railroad extending beyond the town they represent. What may be properly considered in estimating that value discussed. 53
8. A railroad corporation should be regarded as a resident of the several towns and wards through which its road extends, within the meaning of the tax laws, and assessed therein for its real estate, the same as taxable inhabitants are assessed for their real estate situated therein. The real estate of railroad companies which is occupied and used by them for railroad purposes is not required to be assessed as "non-resident lands." 53
9. Certificates of indebtedness of the United States, issued pursuant to the acts of congress passed in 1862, are not "securities" within the act

of congress of February 26, 1862, exempting from taxation all "stocks, bonds and securities of the United States." *The People ex rel. The Phoenix Fire Ins. Co. v. Gardiner*, 608

10. They are merely certificates or acknowledgments of a pre-existing indebtedness, incurred in the ordinary way, without any security or any specific pledge of the public faith. 3
11. Congress, in exempting "securities" from taxation, has not excluded the states from the power to tax these certificates. 3
12. The act of the legislature of April 6, 1866, (*Laws of 1866*, ch. 418,) does not limit the authority of the county treasurer of Kings county, in issuing the certificates of indebtedness specified in section 8, to cases of taxes on investments which have been judicially decided to be exempt. 3

#### TENDER.

See AGREEMENT, 6, 7.

#### TENANTS IN COMMON.

1. One tenant in common, although he have the exclusive possession of the common property, is not liable to account to the other tenants in common either for rent or for a share of the profits; unless there be an express agreement that he shall do so. *Wilcox v. Wilcox*, 327
2. Where a married woman is a tenant in common with others of property occupied by her and her husband, his occupation being that of his wife, no action will lie against him by the other tenants in common, for rent, without proof of an agreement to pay it. 3

#### TORT.

See DAMAGES.

#### TRADE MARKS.

1. Where the defendant has procured a trade mark closely resembling one

already in use by the plaintiff, and has attached it to a perfume manufactured by him, adopting the same name and style of packages as the latter, with the intention of counterfeiting the plaintiff's trade mark, as well as imitating the article, and style of packages used by him, and of appropriating, through such counterfeit label, the market obtained for the perfumery of the plaintiff, and in this design he has been to some extent successful, and has thereby injured the plaintiff, it is a proper case for an injunction to restrain the use of the label or trade-mark, notwithstanding the defendant sets up the defense that the plaintiff, in selling his perfume, is attempting to impose upon and defraud the public; if the evidence upon that subject is conflicting. *Smith v. Woodruff*, 488

2. That defense ought to be suggested by the court, whenever the imposition on the part of the plaintiff is flagrant. Thus when a quack compounds noxious and dangerous drugs, hurtful to the human constitution, and advertises them as a safe and sure remedy for disease; or when a charlatan avails himself of the prejudice, superstition or ignorance of some portion of the public to palm off a worthless article, even when not injurious, the case falls beneath the dignity of a court of justice to lend its aid for the redress of such a party, who has been interfered with by the imitations of another quack or charlatan. *Per LEONARD, P. J.* 3

3. But the suggestion comes with a poor grace from one who has, by the imitation, been guilty of the same fraud or imposition upon the public, if such it happen to be. *Per LEONARD, P. J.* 3

#### TROVER AND CONVERSION.

1. In an action for the unlawful taking and conversion of personal property, the plaintiff is entitled to recover the value of the property taken; and the fact that the defendants were creditors of the plaintiff and took the property under a void attachment, will not mitigate the injury, nor reduce the damages. *Kelly v. Archer*, 68

2. A legal title, or right of possession is indispensable to the maintenance of an action of trover. An equitable right, merely, without any muniment of legal title, or of a legal right of possession, is not sufficient. *Fulton v. Fulton*, 581

*See* AGREEMENT, 5.

### TRUSTS.

*See* *Leitch v. Wells*, 687.

## U

### USURY.

1. Where usury is set up as a defense, the usurious contract should be so pleaded as that it may appear what rate or amount of interest was taken or secured, and on what sum, and for what time; and the answer should show a corrupt intent. *The National Bank of the Metropolis v. Orcutt*, 256

2. When these facts appear from the terms of the answer, nothing further is necessary, to make it sufficiently definite. 3

3. If the answer avers that the plaintiff discounted the drafts sued on at an usurious rate of interest, contrary to the statute in such case made and provided, and then specifies the amount of interest taken, this, though it may or may not be an insufficient averment of a corrupt intent, is not so palpably defective in this respect as to authorize a judgment for the plaintiff for frivolousness. 3

## V

### VARIANCE.

Although the plaintiff's complaint, in an action to recover back money paid by mistake, alleges a demand, and a refusal to pay back the money, and the defendant's answer admits the refusal to pay, proof of a promise by the defendant, afterwards,

does not present such a variance between the cause of action alleged and the evidence, as will preclude a recovery. *Estes v. Peak*, 92

### VENDOR AND PURCHASER.

1. An absolute contract for the sale of an interest in land, authorizing the purchaser to take immediate possession, the consideration to be paid on demand, vests in the purchaser the equitable interest in the land the moment it is executed and delivered. *McKee v. Sterling*, 380 ✓

2. Such an agreement is not a covenant for the immediate possession, or a condition therefor, the breach of which will void the contract. 3 ✓

3. The destruction of the building on the premises, by fire, after the making of such a contract, is no defense to an action for the purchase money; the purchaser being the owner thereof, and having an immediate interest therein. 3 ✓

*See* AGREEMENT.

### VENIRE.

*See* CRIMINAL LAW, 4.

## W

### WARRANTY.

*See* INSURANCE, (MARINE,) 2.

### WAIVER.

*See* AGREEMENT, 1.

### WILL.

Where all the requisites to the due execution of a will are fully complied with and proved, so far as relates to one of the attending witnesses, and as to the other, it is proved that although he did not see the testator sign the will, it having been signed before he came into the room, yet that he signed the same as a wit-

ness, at the testator's request, and heard him declare at the time that it was *his last will and testament*, this is sufficient proof of the execution of the will to admit the same to probate, though the testator does not state to the witness that he has signed the will. *Beekin v. Beekin*, 200

*See DOWER.*

*Leitch v. Wells*, 687.

#### WITNESS.

1. The amendment of section 399 of the Code making it applicable to surrogates' courts and proceedings therein, not only applied the provision allowing the examination of a married woman as a witness in her own behalf, on her application to the surrogate for letters of administration upon the estate of her deceased husband, but also the restriction on such examination; so that if she came within that restriction she could not be examined in her own behalf, against administrators, to prove any transaction had with the decedent. *Angerine v. Angerine*, 417

2. The term party to an action, which was used before the section was extended to proceedings in surrogates' courts must be construed as applicable to all proceedings to which the first part of that section is made applicable. 13

3. Where, upon an application by an administrator, to the surrogate, for leave to mortgage or sell the real estate of the intestate, a claim of the respondent, against the estate, which was disputed by the administrator, was tried by the surrogate, and after several witnesses had testified to conversations between the intestate and the claimant, which established a "transaction" between them, in relation to the subject matter of the controversy; *Held* that the claimant could not be examined as a witness to prove that no such conversations had occurred—that no such transactions had taken place; such testimony being "in respect to a transaction had personally between the deceased person and the witness." *Dyer v. Dyer*, 190

*See PRACTICE*, 6, 7, 8.

*A. R. H.*

END OF VOLUME FORTY-EIGHT.





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